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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JILL GRAY,

Petitioner,

V.

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; DELMAS ALLEN in both his official and individual capacity; and ROSALIE JENSEN in both her official and individual capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a faculty member at a state college or university can acquire a constitutionally protected interest in continued employment, prohibiting her termination without being afforded due process safeguards, by satisfactorily completing the probationary period requirement established by the institution's written tenure policies, at an institution whose written tenure policies do not preclude securing de facto tenure.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jill Gray respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINIONS BELOW

The opinions of the panel of the United States Court of Appeals for the Eleventh Circuit filed August 21, 1998 are reported at 150 F.3d 1347 (11th Cir. 1998), and are set out in the Appendix at 1a. The Order and Report and Recommendations of the United States Magistrate Judge filed June 25, 1997 is unreported, and is set out in the Appendix at 15a. The July 24, 1997 Order of the United

States District Court for the Northern District of Georgia, rejecting in part the Magistrate Judge's Recommendation and granting Respondents' (defendants below) motion for summary judgment, is unreported, and is set out in the Appendix at 42a. The subsequent November 2, 1998 Orders of the Court of Appeals denying Petitioner's petition for rehearing and suggestion for rehearing en banc are unreported, and are set out in the Appendix at 53a and 55a.

JURISDICTION

The judgment here sought to be reviewed was initially entered on August 21, 1998, when the Court of Appeals issued its decision, with one dissent, affirming the District Court's decision granting Respondents' motion for summary judgment. Petitioner's petition for rehearing was denied, with one dissent, on November 2, 1998. Petitioner invokes the jurisdiction of this court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision that is central to this case is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, contained in Section 1 of that Amendment, which prohibits the states from taking actions that would "deprive any person of life, liberty, or property, without due process of law;". Section 1 of the Fourteenth Amendment reads, in its entirety, as follows:

> Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

> State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Petitioner's Employment History

Petitioner Jill Gray ("Ms. Gray") was hired as an assistant professor to teach computer science in the Math and Computer Sciences Department at North Georgia College (now North Georgia College and State University) for the academic year beginning September 1985. North Georgia College was and is part of The University System of Georgia, and is subject to the governance of Respondent, The Board of Regents of The University System of Georgia. Ms. Gray at that time had had both a B.A. and M.A. degree in philosophy. She was expressly appointed to a tenure track position.

Faculty members at North Georgia College – both tenured and non-tenured alike – were typically employed pursuant to annual contracts of employment setting forth the terms of their employment. Ms. Gray received a new contract annually throughout the period of her employment with North Georgia College. Each of her annual contracts expressly incorporated by reference the regulations of the College, and the Board of Regents Policy Manual, which

included a statement of the tenure policy applicable to her employment.

Ms. Gray taught at the College from 1985 through 1995: initially she taught for seven consecutive years and then, after a one-year leave of absence to pursue graduate studies with the College's approval and support, for another two years. Each year of her employment was subject to the terms of an employment contract as described above.

During her fifth year of teaching she applied for tenure, but was advised by Respondent Dr. Delmas Allen ("Dr. Allen"), then Vice-President for Academic Affairs of the College, that she should pursue coursework towards a Ph.D. before applying for tenure. Following Dr. Allen's guidance, Ms. Gray withdrew her application for early tenure and enrolled in a master's degree program in applied mathematical sciences at the University of Georgia. She continued to teach at North Georgia College while pursuing her advanced degree. Then, during the 1991-92 academic year, the College arranged for her to have a leave of absence from teaching for the 1992-93 academic year, to enable her to pursue further course work toward a Ph.D. at the University of Georgia. Ms. Gray at that time expressly agreed that, upon completion of her leave of absence, she would return to full-time teaching for the following academic year. Dr. Allen further assured Ms. Gray that, assuming she complied with her teaching responsibilities and made progress towards the completion of her Ph.D., it would be acknowledged that she had tenure, consistent with her successful completion of the seven-year probationary period established by the governing tenure policy.

Ms. Gray returned to full-time teaching during the academic year 1993-94. She received a contract for that academic year, consistent with all prior years. At that time she had completed seven academic years of teaching, exclusive of her one year leave of absence, and was commencing her eighth year of full-time teaching. She was given no notice or indication that her employment was in jeopardy. She understood, based upon both the terms of her employment contracts and the assurances of Dr. Allen, that she was entitled to tenure.

During the summer of 1993 Dr. Allen was appointed President of North Georgia College, and during the fall of 1993 he reviewed with the academic administration and the various department heads the anticipated faculty appointments for the ensuing 1994-95 academic year. Under the system that had been in place prior to Dr. Allen's appointment as President, decisions to award tenure were made by the President, after receiving recommendations from one college-wide committee. However, in seeking the presidency of the College in 1993, Dr. Allen had promised the faculty, in return for support of his candidacy, that he would delegate greater authority to the faculty in making tenure decisions, and that he would decline to overrule any faculty committee recommendations. Ms. Gray was unaware of these matters. Dr. Allen at this time requested that Ms. Gray again make a formal tenure application, and to maintain her relationship with him she agreed to do so. She understood that she was already entitled to tenure and that the process was merely a formality.

Ms. Gray's tenure application was unanimously approved by the Department of Math and Computer Sciences faculty committee. That recommendation was forwarded to

the Institutional Promotions/Tenure Committee, a college-wide faculty committee. Respondent Rosalie Jensen ("Dr. Jensen"), a member of the Department of Math and Computer Sciences faculty, who was a member of the Institutional Promotions/Tenure Committee, declined to recommend Ms. Gray to the college-wide committee for tenure, and that committee declined to recommend Ms. Gray for tenure.

Following the decision of the Institutional Promotions/Tenure Committee, Ms. Gray was informed at a meeting with Drs. Allen and Jensen that she would not receive tenure. She was given no reasons for this decision, nor was she offered the opportunity to inquire into the reasons or to have a hearing held at which she could inquire into and challenge the reasons for refusal. Ms. Gray asserted that she was told she could not appeal from the decision of the College to deny her tenure.

In the spring of 1994 the college offered Ms. Gray a so-called "terminal contract" for the 1994-95 academic year. Such a "terminal contract" was authorized, under the Board of Regents' tenure policy, only if given at the end of a seven-year probationary period. At the time the college offered her a "terminal contract" for the 1994-95 academic year, Ms. Gray had been a faculty member for nine years, and had been teaching full-time for eight of those years. Ms. Gray accepted the contract of employment for her ninth year of full-time teaching, expressly subject to her assertion of entitlement to tenure and her reservation of rights to assert that entitlement.

B. The College's Tenure System

Tenure at North Georgia College was premised on the tenure policies set out in Section 803.09 of the Board of Regents Policy Manual (Appendix at 59a). Section 803.09 of the Policy Manual provided that the tenure policy set forth the "minimum standards for award of tenure," but that they were to be "sufficiently flexible to permit an institution to make individual adjustment to its own peculiar problems or circumstances." (§ 803.09.A). That section further provided that tenure "may be awarded, upon recommendation by the president and approval by the Board of Regents, upon completion of a probationary period of at least five years of full-time service at the rank of assistant professor or higher." (§ 803.09.D). The policy went on to provide that "[t]he maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years," which was subject to the exception that a "terminal contract for an eighth year" could be extended if a recommendation for tenure was not approved by the Board of Regents (§ 803.09.F). The Board of Regents tenure policy then provided for grounds of dismissal applicable to both tenured faculty "or a non-tenured faculty member, before the end of his contract term,..." (§ 803.09.K).

That statement of tenure policy is consistent with, and clearly based upon, the 1940 Statement of Principles on Academic Freedom and Tenure adopted by the American Association of University Professors ("AAUP Statement of Principles") (Appendix at 67a), which numerous courts, as discussed below, have acknowledged as stating the foundation principles of academic tenure in the United States. The tenure policies implemented by the Board of

Regents delegate, both expressly and implicitly, certain decisions to the individual institutions in implementing actions concerning tenure. But – consistent with the AAUP Statement of Principles – it is clearly implied in the Board of Regents' tenure policy that a faculty member at the rank of assistant professor or higher may not be employed beyond seven years without achieving tenure, with the one exception that a one-year "terminal contract" may be offered for an eighth year if such faculty member is not receiving tenure (§ 803.09.F).

The administration of North Georgia College was well aware that the tenure policy governing faculty at that institution provided for and recognized that de facto tenure could be achieved, consistent with the Board of Regents' policies. Dr. Allen interpreted the applicable Board of Regents Policy Manual provision to mean that a faculty member who had been employed for seven consecutive years and was re-employed without notice of termination was entitled to automatic tenure. And Dr. Allen's successor as Vice-President for Academic Affairs, John Pearce, similarly indicated his understanding that seven years of continuous service might normally entitle a professor to tenure. Certainly the interpretation of the College's President – on whom Ms. Gray had relied and whose guidance she had followed – is entitled to considerable weight in interpreting and applying policies concerning tenure.

C. The Proceedings Below.

Ms. Gray brought this action in the United States District Court for the Northern District of Georgia, alleging that she had been denied tenure because of her sex and age in violation of Title VII of the Civil Rights Act of 1964, 42

U.S.C. §2000(e), as amended, and the Age Discrimination in Employment Act, 29 U.S.C. §621. She also brought claims under 42 U.S.C. §1983 for violation of constitutionally protected rights, including her right to procedural due process secured by the Fourteenth Amendment to the United States Constitution. Jurisdiction was premised on the jurisdictional provisions of those Acts and the jurisdictional grant of 28 U.S.C. §1331. She also asserted a pendent claim for breach of contract, under principles of supplemental jurisdiction, pursuant to 28 U.S.C. §1367. Ms. Gray sued The Board of Regents, and Drs. Allen and Jensen in both their official and individual capacities.

After discovery the parties below filed cross-motions for summary judgment. Respondents asserted immunity under the Eleventh Amendment to the United States Constitution; and also asserted that they were entitled to summary judgment on Petitioner's claims that she had been subjected to unlawful discrimination on the basis of sex or age, and that she had been denied tenure in violation of her contract and procedural due process rights. Ms. Gray, in turn, sought summary judgment on her claims for legal relief and for deprivation of constitutional due process rights. The District Court referred the parties' motions for summary judgment to a Magistrate Judge, for a report and recommendation.

On June 23, 1997 the Magistrate Judge entered his Order and Report and Recommendation. By his Order the Magistrate Judge recommended, inter alia, that Respondents' motion for summary judgment seeking dismissal of Petitioner's claim of deprivation of constitutional due process and breach of contract be denied, on the basis that there were genuine factual issues as to whether Petitioner was entitled to

de facto tenure based on her years of service, which could have provided her a constitutionally protected property interest in continuing employment (Appendix at 20a-31a).

The United States District Judge, in a Judgment and Order entered July 24, 1997, rejected that portion of the Magistrate Judge's recommendations denying Respondents' motion for summary judgment on Petitioner's contract and due process claims, and entered a Final Judgment dismissing Petitioner's complaint. The District Court disregarded Petitioner's assertion of either a contractual or de facto entitlement to tenure, concluding that such reliance was inconsistent with the existence of a written policy (Appendix at 43a-49a).

Ms. Gray appealed the District Court's Final Judgment to the United States Court of Appeals for the Eleventh Circuit, asserting that the District Court erred in granting summary judgment in favor of Respondents on Petitioner's claims for deprivation of procedural due process; for breach of contract; for discrimination on the basis of sex and age; and for the individual Respondents on their defense of immunity. By an Order entered August 21, 1998 the Court of Appeals – over the dissent of Senior Circuit Judge Clark – affirmed the District Court's Judgment. The majority held, inter alia, that Petitioner was not entitled to tenure as a matter of contract; and that Petitioner was not entitled to de facto tenure. The majority weighed heavily the fact that the College had a formal tenure system, on which the District Court had relied in denying Petitioner's claimed entitlement to automatic, or de facto tenure, and held accordingly that Ms. Gray had no property right entitling her

to the due process protections afforded by the Fourteenth Amendment.[1]

In dissent, Judge Clark found that a combination of the Board of Regents' tenure policy and the testimony of the College President, "a most persuasive authority," along with other facts, "could provide enough evidence for a jury to find that Gray had received tenure de facto." (Appendix at 13a-14a).

Petitioner moved for reconsideration and suggested a rehearing en banc. By Orders entered November 2, 1998, the same majority – over Judge Clark's dissent – denied the Petition for Rehearing and the suggestion of rehearing en banc (Appendix at 53a and 55a).

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[1] In reaching its conclusion, the majority indicated that it was not ruling out "the possibility of an implied contract where explicit tenure is available." 150 F. 3d at 1352, note 7 (Appendix at 11a). The majority specifically recognized that Dr. Allen, the President of the University, had testified to his interpretation of the tenure policy that was consistent with the availability of automatic, or de facto, tenure, but apparently gave that testimony no evidentiary weight.

REASONS FOR GRANTING THE WRIT

A. The Decisions of the Circuits are Divided and Inconsistent Concerning Whether a Hybrid Tenure System Incorporating De Facto Tenure Elements Can Give Rise to Legitimate Expectations of Employment Protection for University Faculty.

It is more than a quarter of a century since this Court, in the companion cases of Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), directly addressed issues concerning whether and under what circumstances the due process guarantee of the Fourteenth Amendment is afforded to faculty members at state colleges and universities asserting entitlement to tenure. In Roth this Court found that a teacher who was not rehired after his initial year of teaching under a one-year employment contract at a state university, and who had no more than an "abstract need or desire" or a "unilateral expectation" of continued employment, 408 U.S. at 577, did not have a constitutionally protected entitlement to continued employment, and accordingly was not entitled to the protections of due process, i.e., the right to be informed of the reasons for his termination and to have a formal hearing at which the decision could be challenged. 408 U.S. at 569-70, 573, 578.

The Roth Court did recognize, however, that under appropriate circumstances a faculty member at a public institution might have a constitutionally protected interest in continuing employment, depending upon the applicable tenure policy. 408 U.S. at 576-77. And in the companion

case of Perry v. Sindermann, the Court expressly recognized that such a constitutionally protected interest could apply to a faculty member at any public institution which had no formal written tenure policy, based upon "an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." 408 U.S. at 602.

The Roth and Sindermann decisions foreshadowed an increasing flow of litigation presenting the issue as to when, and under what circumstances, a faculty member threatened with termination at a state college or university after complying with the terms of a stated probationary employment period was entitled to the protections of procedural due process. The decision of the Court of Appeals for the Eleventh Circuit in the instant case is only the most recent emanation of this issue, which over the past 20 years has been addressed, with varying results, by almost all the Circuits, and many lower courts. Most of these cases have involved, in one form or another, the contention that a faculty member was entitled to de facto tenure consistent with either formal or informal policies recognized by the subject institution.[2]

A number of the Circuits that have addressed this issue have tied the existence of a constitutionally protected property interest in a faculty member's employment to tenure and have found that the existence of a written tenure policy effectively precluded faculty from entitlement to de facto tenure. That was indeed the essential basis of the holding of

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[2] De facto tenure is a well recognized concept, according to which a faculty member may earn tenure by achieving a satisfactory period of "probationary" service at the subject institution. See, e.g., Perry v. Sindermann, supra, 408 U.S. at 600-01.

the Court in the instant matter (Appendix at 10a-11a); and of those Circuits and lower courts which have denied the existence of a constitutionally protected due process right to faculty asserting entitlement to tenure de facto. See Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992); Edinger v. Board of Regents of Morehead State University, 906 F.2d 1136 (6th Cir. 1990) (over dissent of Chief Judge Merritt); Cohen v. Board of Trustees of the University of Medicine and Dentistry of New Jersey, 867 F.2d 1455 (3rd Cir. 1987); Staheli v. University of Mississippi, 854 F.2d 121 (5th Cir. 1988); Lovelace v. Southeastern Massachusetts University, 793 F.2d 419 (1st Cir. 1986); and Haimowitz v. The University of Nevada, 579 F.2d 526 (9th Cir. 1978).

Other Circuits, however, have found to the contrary: that a faculty member asserting a right to de facto tenure, based upon compliance with requirements for years of service during a stated probationary period, might have a constitutionally protected interest in continuing employment, so long as the institution's formal tenure policy did not preclude a legitimate expectation of such employment on the faculty member's part. See Jones v. University of Central Oklahoma, 13 F.3d 361 (10th Cir. 1993); Soni v. Board of Trustees of the University of Tennessee, 513 F.2d 347 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976); and Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972). These courts have recognized that the assertion of de facto tenure, even when the subject institution had issued written tenure guidelines or policies, could give rise to a legitimate expectancy of continued employment warranting entitlement of a faculty member to the right to know the reasons for the adverse employment decision, and the right to present evidence and challenge the decision at a formal hearing.

The central issue here is whether a claim of de facto tenure at an institution with a written tenure policy may be entitled to any such protection at all. As a practical reality, the denial of any realistic possibility of de facto tenure is inconsistent with essential principles undergirding the AAUP's 1940 Statement of Principles (Appendix at 67a), and with the practices of colleges and universities generally.

Likely for that reason, a number of federal district courts have found that claims of constitutional due process based on de facto tenure could be premised upon expectations of continued employment at institutions with some form of written tenure policy. See, e.g., Steinberg v. Elkins, 470 F. Supp. 1024 (D. Maryland 1979); Ngwenyama v. Board of Regents of the University of Michigan, 1998 WL 878555 (E.D. Mich., December 9, 1998) (finding, as a matter of fact, that the plaintiff had received the constitutional due process to which he was entitled in connection with the termination of his employment). Other courts have found to the contrary. See, e.g., Chinea v. Benitez, 702 F. Supp. 298 (D.P.R. 1988), aff'd, 879 F.2d 854 (1st Cir. 1989). The distinctions in these approaches to determining whether a faculty member's reliance on de facto tenure gives rise to a legitimate expectation of continued employment have real consequences -- most visibly evidenced by the attention of

commentators to the continued stream of litigation over that very issue[3] and the organizational concern shown by the AAUP.[4]

The significance of tenure, per se, as a primary foundation block for academic freedom and the education of a society's members – as distinct from debates over how and whether tenure should be granted or limited – is not usually in dispute. See, e.g., discussions of the significance of academic tenure in this Court's decision in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) and in Justice Douglas's impassioned dissent in Board of Regents v. Roth, supra, 408 U.S. at 579 (1972). What has been, and was in this case below, the subject of important debate, however, is whether, consistent with the common understanding of the importance of tenure, an individual who has complied with the requirements of a university's stated probationary period requirements has a legitimate expectancy in continued employment warranting the minimal due process protections guaranteed by the Fourteenth Amendment.

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[3] The extraordinary amount of litigation over this issue is catalogued in J. D. Copeland and J.W. Murray, Jr. "Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance," 61 U.Mo.L.Rev. 233 (Spring 1996); and the Annotation "Construction and Effect of Tenure Provisions of Contract or Statute Governing Employment of College University Faculty Member," 66 A.L.R.3d 1018 (1997).

[4] The AAUP currently provides on its Web Site a statement and collection of recent cases on the subject of de facto tenure, dated January 1999. The Web address for that information is http://www.aaup.org/legdefac.htm.

The Gray Court below found that Petitioner had no such interest, despite her compliance with the requirements of a seven-year probationary period of employment and her reliance on the College President's assurance that she had earned tenure. The decisions of the Court of Appeals for the Fourth, Sixth and Tenth Circuits, and several lower courts, discussed above, have found to the contrary. If nothing else, public systems and institutions of higher education, and the faculty they employ, are entitled to greater certainty about the rights of faculty members to tenure under systems which allow, either explicitly or by reasonable inference, a professor to earn tenure by virtue of satisfactory and continuous employment for a stated probationary period.

In the instant case, there is substantial evidence – including the clear statement of the Board of Regents' policy that a faculty member may not be re-employed after a seventh year except with tenure, unless with notice and a one-year "terminal contract," and the President's statement of understanding of that policy consistent with Ms. Gray's assertion of entitlement to de facto tenure – to warrant a determination that Ms. Gray had a legitimate expectation of continued employment with North Georgia College entitling her, at a minimum, to constitutionally guaranteed due process rights when her termination was threatened and imposed.

For this Court to so rule, and find that Petitioner had such legitimate expectancy and the accompanying right to due process protection, it need not create an inflexible straightjacket for academic institutions. Rather, it could establish clearer understandings to guide both academic institutions and their faculty members alike in understanding

what rights faculty members have to continued employment.[5]

B. There is a Substantial Interest of National Significance in Recognizing De Facto Tenure, as Giving Rise to Legitimately Protected Property Interests Subject to Constitutional Due Process Protections.

The issue of whether or not a faculty member may acquire tenure de facto by satisfactorily completing a lengthy period of employment is not a matter of local interest alone. Although any public (or private) system or institution may choose to adopt a formal tenure policy that expressly precludes the possibility of earning tenure by length of satisfactory service, many such systems or institutions apparently have not chosen to do so. And considerations of fundamental fairness to teachers who have satisfactorily completed lengthy terms of probationary employment in compliance with standards that are commonplace and widely recognized throughout academia suggest that those individuals have a legitimate expectancy of continued employment that merits their entitlement to elementary due process protections. In the words of Professor Van Alstyne,

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[5] Mister Justice Breyer, when a Circuit Judge, in his decision in Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981), noted the undesirability of courts determining what specific procedures universities should follow in making their tenure decisions. 643 F.2d at 875. That concern is in no way inconsistent with recognizing the existence of entitlement to automatic tenure on completion of a satisfactory probationary period. Certainly colleges and universities have sufficient incentives to state their tenure policies clearly, and exclude the possibility of de facto tenure if they so choose.

the importance of tenure is not to guarantee lifetime employment, but rather to provide that "no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed *without adequate cause*." (emphasis in original).[6] Professor Van Alstyne there continued to describe tenure as indicating

> that the institution, after utilizing a probationary period of as long as six years in which it has had ample opportunity to determine the professional competence of its appointees, has rendered a favorable judgment establishing a rebuttable presumption of the individual's professional excellence.

Id. pp. 4-5.

Recognizing the possibility of rights to de facto tenure is perfectly consistent with the understanding of this Court, expressed in Perry v. Sindermann, supra, that the "absence of... an explicit contractual provision [assuring continued employment unless cause for termination is shown] may not always foreclose the possibility that a teacher has a 'property' interest in re-employment," 408 U.S. at 601, and that entitlement to the protections of tenure may be based upon "the existence of rules and understandings, promulgated and fostered by state officials..." that might justify a legitimate claim of continued employment, absent cause for dismissal. 408 U.S. at 603. In this conclusive

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[6] W. Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense'" AAUP Bulletin 57 (Autumn 1971), reprinted in The Case for Academic Tenure, M. Finkin, Ed. (ILR Cornell University Press 1996).

respect, the Circuits which had adopted this line of reasoning – and not the Court of Appeals in the instant case – are following correct analysis: as the Tenth Circuit held in Jones v. University of Central Oklahoma, supra:

> "legitimate claim of entitlement" in the state university tenure setting is defined solely through the application of state contract and employment law. If, under state law, the employee can establish a contract right to continued employment through an alleged unwritten "local tenure" procedure – even when there exists a written procedure already on the books – then his claim is legitimate and the state has granted him a property interest protected by the due process clause.

13 F.3d at 365. Indeed, it is on just such a basis that Petitioner here relies.

Numerous courts have noted and recognized the general applicability of the AAUP 1940 Statement of Principles on Academic Freedom and Tenure as the foundation of tenure policies throughout institutions of higher education in this country. The District Court in Schneider v. Northwestern University, 925 F. Supp. 1347 (N.D. Ill. 1996), expressly noted that Northwestern – concededly a private institution -- adhered to the AAUP principles and thus recognized de facto tenure. Other courts have also acknowledged the recognition accorded by educational institutions to the AAUP Statement of Principles. See, e.g., Steinberg v. Elkins, 470 F. Supp. 1024, 1026–27 (D.Md. 1979); Cohen v. Board of Trustees of the University of Medicine and Dentistry of New Jersey, 867 F.2d 1455,

1469 (3rd Cir. 1987); Mayberry v. Dees, 663 F.2d 502 (4th Cir 1981), cert. denied, 459 U.S. 830 (1982).[7]

Several of the circuit courts that have found de facto tenure systems to be incompatible with the existence of a written tenure policy, and thus denied due process protections to faculty claiming de facto tenure, have indicated that "extraordinary circumstances" might permit a different conclusion. See, e.g., Edinger v. Board of Regents of Morehead State University, supra, 906 F.2d at 1140; Lovelace v. Southeastern University, supra, 793 F.2d at 423. Such reasoning has been employed by these Courts to explain the apparently contradictory conclusions from other Circuits referenced above. Such explanation of the different results reached by these other Courts, however, should not rest on something as subjective as "extraordinary circumstances" if constitutional due process rights are to have real meaning. There is no need to ignore the rights of faculty members who assert reliance on commonly understood principles of de facto tenure in response to having been terminated without cause or explanation. Nor does the recognition of the possibility of according constitutional due process to teachers asserting de facto tenure require courts to intrude unnecessarily into the administration of public institutions.

In other words, none of the justifications normally relied upon for precluding faculty at public institutions from

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[7] In Mayberry the Court addressed a terminated professor's claim of denial of tenure in retaliation for the exercise of protected speech; it nonetheless clearly stated that the rules governing academic tenure "derive primarily from generally applicable nationwide principles...." which had as their source the 1940 AAUP Statement of Principles. 663 F.2d at 513.

asserting de facto tenure – when such assertion is consistent with and not expressly prohibited by an employer's formal tenure policy – merits the denial of constitutional due process. Faculty members typically have no say in the tenure policy or practices of the institutions for which they work. When they comply with the probationary period requirements of their employment – as Ms. Gray unquestionably did in the instant case – and when they assert more than an "abstract need" or "unilateral expectation" of continual employment – as Ms. Gray did in the instant case – they should not be deprived of their due process rights, when no valid reason for doing so exists.

CONCLUSION

For the reasons stated above, this Court should grant Petitioner's petition, and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, to review that Court's judgment in the instant matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8902

D. C. Docket No. 2:95-CV-152

JILL GRAY,

Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; DELMAS ALLEN, in both his official and individual capacity, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(August 21, 1998)

Before EDMONDSON and CARNES, Circuit Judges, and CLARK, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

This appeal involves a denial of tenure to a state college professor and the professor's claims of a violation of procedural due process, breach of contract, sexual discrimination, and age discrimination. Plaintiff-Appellant appeals the district court's grant of summary judgment for defendants and the court's denial of partial summary judgment in her favor. We affirm.

Background

Plaintiff Jill Gray is a fifty-two year old woman formerly employed as an assistant professor at North Georgia College & State University. North Georgia is governed by the Board of Regents of the University System of Georgia.

Plaintiff was hired to teach in the Mathematics and Computer Science Department in September 1985 even though she had a B.S. and M.A. in philosophy. As a nontenured assistant professor, plaintiff was given a one-year employment contract each academic year.

Plaintiff first applied for tenure during the 1989-90 academic year. She discussed her application with defendant Dr. Delmas Allen, who was then Vice President of Academic Affairs. On the advice of Allen, plaintiff withdrew her 1989-90 application for tenure to pursue an advanced degree in either mathematics, computer science, or another closely related field.

After completing her seventh year of teaching, plaintiff was granted a leave of absence during the 1992-93 academic year to attend graduate courses full-time at the University of Georgia.

Plaintiff taught no classes during this time but was paid half her salary and received financial assistance to help pay her tuition.

Plaintiff returned to full-time teaching at North Georgia under an eighth contract for the 1993-94 academic year. During that year, plaintiff again applied for tenure. In September 1993, plaintiff received a letter from Allen, who was then President of North Georgia, notifying Gray that her contract would be renewed for the 1994-95 year pending the decision of the tenure committee. After considering Gray's tenure application, the Promotion and Tenure Committee of the Mathematics and Computer Science Department recommended that plaintiff be granted tenure. But, the Institutional Promotion and Tenure Committee recommended that plaintiff not be granted tenure. Allen notified plaintiff of this latter decision in a letter dated 25 January 1994.

In May 1994, plaintiff received and signed a contract for her ninth year of teaching at North Georgia -- marked as her "final contract." With this contract, Gray enclosed a letter informing Allen that, by signing the contract, she was not waiving her rights to challenge the adverse tenure decision. Plaintiff's employment ended in June 1995; and she brought suit in November 1995.

The district court granted summary judgment for defendants on all grounds and denied plaintiff's motion for partial summary judgment.[1]

Discussion[2]

North Georgia has an established practice for formally awarding tenure. The basic criteria for tenure at North Georgia include (1) excellence in teaching; (2) service; and (3) academic achievement and professional growth. North Georgia expects the applicant for tenure to present evidence of excellence in two of the three areas; and to present evidence of average or better performance in the third. Superior performance in teaching is essential; otherwise, no order of importance is indicated by the college.

Each year department heads request that all eligible faculty who choose to apply for tenure submit a dossier and document file. The Department Head sends all documentation to members of the Department Promotion and Tenure Committee. This committee interviews the applicant, deliberates, and returns the package to the Department Head with a written recommendation. The Department Head reviews the recommendation, adds a

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[1]Defendants' motion for summary judgment on the grounds of immunity (11th Amendment and qualified) was denied as moot because the district court dismissed plaintiff's federal and constitutional claims. We do not consider these immunity issues.

[2]We only discuss the tenure issue; we see no reversible error on the other claims, including the sex and age discrimination claims.

personal statement about the applicant, and forwards the entire package to the Vice President of Academic Affairs.

The Vice President submits all tenure materials to the Institutional Promotion and Tenure Committee -- which reviews each candidate and makes a recommendation to the Vice President. These recommendations, along with his own, are then forwarded to the President for his consideration. The President's recommendations are forwarded to the Chancellor, and the Chancellor's recommendations are forwarded to the Board of Regents for the final approval of tenure.

Whether Summary Judgment Was Appropriate

Plaintiff acknowledges that she was not awarded tenure in the usual way. But Gray argues she had tenure or its equivalent and, therefore, a property interest in continued employment at North Georgia (subject to the Fourteenth Amendment's due process guarantees) under two theories: (1) the express language of her contract automatically granted plaintiff tenure in her eighth year of teaching; and (2) the conduct of and documents of defendants plus the institutional understanding of tenure gave plaintiff de facto tenure.

The success of due process arguments depends upon the finding of a constitutionally protected property interest in the expectation of continued employment or of a liberty interest having been infringed upon by the State; absent such interest, no due process protections attach. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). A person claiming a property interest in a benefit "must have more than an abstract need or desire for it . . . . He must . . . have a legitimate claim of entitlement to it." Id. at 577. Moreover,

property interests, by their nature, are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Id.

Theory 1 - Tenure with a Grant of the Eighth-Year Contract

Plaintiff brings out that her written employment contracts expressly provided that they were made subject to the bylaws/policies of the Board of Regents, which is the only place where tenure is described. And, Gray says that her mere presence as a member of the faculty beyond a seven-year probationary period demonstrates she was protected by the tenure system.

At all times, Gray was an employee within an employment system that uses a formal tenure system. The policies of the system are written and widely-circulated. Each yearly contract signed by Gray, including the last, contained the following provisions:

I HEREBY ACKNOWLEDGE THAT THIS CONTRACT AND THE ATTACHED EXHIBIT 'A' [the regulations of North Georgia and the bylaws/policies of the Board of Regents] CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND SHALL NOT BE CHANGED, MODIFIED, AMENDED, WAIVED OR DISCHARGED EXCEPT BY AN INSTRUMENT IN WRITING SIGNED BY THE PARTIES HERETO.

I UNDERSTAND THAT AT THE EXPIRATION OF THE TERM OF THIS CONTRACT I WILL NOT BE REEMPLOYED UNLESS THERE IS A NEW AND SEPARATE OFFER BY THE BOARD OF REGENTS ON

BEHALF OF NORTH GEORGIA COLLEGE AND ACCEPTANCE THEREOF BY ME.

Gray's "property" interest in employment, if any, was created and defined by the terms of her contract.[3] By contract, her interests in employment were secured for one college term only.

Like Roth, the contract specifically provided that Gray's employment expired on a set date (the end of the term). And, the contract had no provision for renewal: it expressly negates future employment absent a new and separate offer by the Board of Regents. Thus, the terms of the contract on the contract's face secured no interest in reemployment for the future.

Plaintiff points beyond the face of the contract. She claims university system policy, incorporated by reference into the contract, created her right to reemployment. She relies directly on section 803.09(F) of the Board of Regents Policy Manual, which states:

The maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years, provided, however, that a terminal contract for an eighth year may be proffered if an institutional recommendation for tenure is not approved by the Board of Regents.

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[3] Interpretation of a contract is a question of law. Wheat, First Securities, Inc. V. Green, 993 F.2d 814-817 (11th Cir. 1993); Irvin v. Laxmi. Inc., 467 S.E.2d 510, 512 (Ga. 1996).

But nothing in the words upon which plaintiff relies says that the professor, after seven years, must be viewed as tenured if the professor receives another ordinary contract for an eighth year.[4] The words create no entitlement for professors and, at most, create a duty for local college and university officials not to do something: not to keep giving contracts to nontenured faculty members.

We find it helpful to refer to the laws of Georgia's public school system for elementary and secondary education to see how something very much like "tenure" is conferred in that system:

> A teacher who accepts a school year contract for the fourth consecutive school year from the same local board of education may be demoted or the teacher's contract may not be renewed only for those reasons set forth in subsection (a) of Code Section 20-2-940.

O.C.G.A. § 20-2-942(b)(1). Thus, Georgia has provided in no uncertain terms what the consequence is for public school teachers who are awarded a contract for a fourth consecutive school year: they get definite rights that look much like "tenure."

In sharp contrast, the Board of Regents manual to which Gray points says nothing about a professor getting new rights or new protections or a new status if the professor is awarded an eighth contract. To the contrary, the words relied on by plaintiff in the manual signal that an award of tenure is

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[4]Plaintiff's eighth-year contract says nothing about its being a "final contract." Nor does the evidence show that plaintiff was told when the contract was proffered to her that this contract was a final contract.

something apart from getting a contract for a particular year and that tenure requires the approval of the Board of Regents.[5]

The manual tells local college and university officials that no regular eighth-year contract should be given unless an award of tenure has been made already; that idea is a very different idea than saying that proffering a contract for an eighth year vests a professor with tenure. And, particularly considering that Georgia -- although in not exactly the same context -- has demonstrated a style of speaking more plainly when educators are to get continuing contracts, we see no ambiguity in the Board of Regents Policy Manual that helps plaintiff at all.

The Board of Regents Policy Manual and Gray's employment contracts make it clear to us, as a matter of law, that a professor is nontenured until she, upon approval of the Board of Regents, is awarded tenure and that getting an eighth-year contract, by itself, is not getting tenure or the equivalent of tenure. Without being granted tenure, plaintiff had no right to reemployment, either under the terms of her

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[5]For tenure, the need for approval of the Board of Regents is stressed in a related and earlier part of section 803.09:

> D. Tenure may be awarded, upon recommendation by the president and approval by the Board of Regents, upon completion of a probationary period of at least five years of full-time service at the rank of assistant professor or higher.

(emphasis added).

contract, under the regulations of North Georgia, or under the bylaws and policies of the Georgia Board of Regents.

Theory 2 - De Facto Tenure

Still, plaintiff advances another theory that might support a claim to continuing employment. The Supreme Court in Perry v. Sindermann acknowledged that a professor might obtain de facto tenure even though tenure has never been formally conferred. 408 U.S. 593 (1972). This result is possible under a theory of implied contracts whereby "[e]xplicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in the light of the surrounding circumstances. . . .The meaning of [the promisor's] words and acts is found by relating them to the usage of the past." Id. at 602 (internal quotations and citations omitted).

The Sindermann Court concluded that just as there may be a "common law of a particular industry or of a particular plant . . . there may be unwritten common law in a particular university that certain employees shall have . . . tenure." Id. (internal quotations omitted). Thus, a property interest might be manifested by an employer's historical practices and past conduct which rise to the level of a "common law," or institutional understanding, of the employment relationship that both parties recognize and rely on as establishing their respective rights and responsibilities.

Although the Board of Regents never formally conferred tenure upon Gray, we will consider whether some pre-existing practice by the college gave rise to a legitimate claim of entitlement to continued employment for Gray. Plaintiff contends such an entitlement exists because of an

institutional understanding that a faculty member receives tenure by default under the Board of Regents' policy if one serves as assistant professor for more than seven years. After considering the record -- with the evidence viewed in favor of the plaintiff -- we cannot agree.

The evidence advanced to support an institutional understanding of automatic tenure is Dr. Allen's deposition testimony: "My interpretation [of the Board of Regents Policy Manual section 803.09(F)] is that if a faculty member is here without applying for tenure and resides or isn't picked up within seven years and there's been no break in time, yes, they're entitled to automatic tenure."[6] Assuming for the sake of argument that Georgia law will allow some kind of de facto tenure, we conclude plaintiff's evidence is legally insufficient.[7] In so concluding, we have considered, among other facts, that the college does have an explicit and formal tenure system.

To show a "custom" or institutional understanding, plaintiff must show some historical basis for believing the custom existed. But, plaintiff introduced no evidence that the kind of automatic tenure she now claims had ever been used at North Georgia before she filed this lawsuit. She has pointed to no one who in the past got tenure in this manner. Also, none of the many deponents from the college testified

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[6]Dr. Allen gave similar testimony at other points in his deposition. But this statement is the one chiefly discussed by the parties.

We note that in Gray's situation there seemingly had been a break in time: the 1992-93 academic year. This fact, however, is not critical to our decision.

[7]We do not decide today whether Georgia law precludes altogether the possibility of an implied contract where explicit tenure is available.

about the existence of such a custom. And, as a matter of law, one administrator's stated "interpretation" of the Board of Regents Policy Manual -- an interpretation not based on concrete experience with someone actually getting tenure by default -- cannot rise to the level of "common law" of the university that Sindermann demands. Thus, Gray's de facto tenure claim must also fail.

Conclusion

We agree with the district court's decision that Gray never had tenure (and therefore no property right entitled to protection under the Fourteenth Amendment).[8] "The institution of tenure has an inexorable internal logic: the very existence of a tenure system means that those teachers without tenure are not assured of continuing employment." Staheli v. University of Mississippi, 854 F.2d 121, 124 (5th Cir. 1988). "The whole purpose of the distinction between tenured and non-tenured faculty [is to give the college] discretion over the employment of non-tenured teachers." Id. at 125; See Megill v. Board of Regents, 541 F.2d 1073, 1078 (5th Cir. 1976) (because Florida college had explicit written tenure program teacher had no reasonable expectation of reemployment). Gray is unhappy with the way the college exercised its discretion. But the circumstances she has evidenced do not create a protected property interest.[9]

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[8]Our decision is in agreement with a similar Sixth Circuit case. See Edinger v. Board of Regents, 906 F.2d 1136 (6th Cir. 1990) (professor remaining employed beyond probationary period did not acquire tenure).

[9]Gray says that Allen, when Vice President of Academic Affairs, made particular representations and assurances to her that she was progressing toward tenure (by taking advanced courses). She argues that these statements created a constitutionally protected property interest. But one's reliance on a person's "promises" to one specifically is quite

AFFIRMED.

CLARK, Senior Circuit Judge, dissenting:

I disagree that the evidence was insufficient to create a genuine issue of material fact in this case, and I would therefore find that the district court erred in granting summary judgment. The majority concludes that nothing in the language of the policy manual says that after seven years a professor who continues to teach has tenure, and no words in the employment contract created an entitlement. I think that this conclusion misses the point of a de facto argument: if the express language was present, then a de facto analysis would be unnecessary.

The Board of Regents policy manual provided that an assistant professor could serve only seven years without tenure, except that a final contract for an eighth year could be allowed. Gray taught for seven years, then was given a year off to return to school to work toward the degree that she had been told would enhance her application for tenure. The college paid for at least part of her tuition and paid half her salary during that year off, and they had an agreement with Gray that she would return to full-time teaching. She returned to full-time teaching for two years after her year off, teaching for a total of nine years.

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different from relying on an established custom or general institutional understanding at the college. And, even if a definite promise was made (which is unclear even from plaintiff's own testimony), Allen's representations about tenure cannot bind North Georgia and the Board of Regents beyond the terms of the written contracts. See generally Brown v. State Bd. of Exam'rs of Psychologists, 378 S.E.2d 718 (Ga. Ct. App. 1989) (state agency not estopped by agent's representations).

The Supreme Court stated in Board of Regents of State Colleges v. Roth:[10] "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[11]

The policy manual says that professors should not be teaching more than seven years unless they are tenured. Not only did Gray teach more than seven years, after her seventh year of teaching the college paid half her salary while she attended school and assisted her with tuition. This is not the behavior of an employer who does not intend to retain an employee. Moreover, the college president, a most persuasive authority, testified in his deposition that his interpretation of the Board of Regents policy manual was that a faculty member who continued teaching after seven years was entitled to automatic tenure. The majority finds this evidence insufficient because one administrator's interpretation of the manual did not provide evidence of a custom or institutional understanding. That statement alone may not be conclusive, but when combined with the other facts, could provide enough evidence for a jury to find that Gray had received tenure de facto.

I think that the evidence is sufficient to create a genuine issue of fact. I cannot say that Gray will definitely prevail, but I think that an issue of fact exists and that summary judgment was erroneously granted.

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[10] 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

[11] Id. at 577, 92 S.Ct. at 2709 (emphasis added).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

JILL GRAY,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
	:	NO. 2:95-CV-152-WCO
V.	:	
	:	ORDER FOR SERVICE
	:	OF REPORT AND
BOARD OF REGENTS OF	:	RECOMMENDATION
THE UNIVERSITY	:	OF UNITED STATES
SYSTEM OF GEORGIA,	:	MAGISTRATE JUDGE
Et Al.,	:	
Defendants.	:	

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Local Rules 260 and 500. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of the receipt of this order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no

objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S.Ct. 729 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 23 day of June, 1997.

/s/
UNITED STATES MAGISTRTE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

JILL GRAY,	:	
Plaintiff,	:	
	:	
V.	:	
	:	
	:	CIVIL ACTION NO.
	:	2:95-CV-152-WCO
	:	
BOARD OF REGENTS OF	:	
THE UNIVERSITY	:	
SYSTEM OF GEORGIA;	:	
DELNIAS ALLEN,	:	
in both his official and	:	
individual capacity, and	:	
ROSALIE JENSEN, in	:	
both her official	:	
and individual capacity,	:	
Defendants.	:	

ORDER
and
REPORT AND RECOMNENDATION

The plaintiff filed this action alleging that she was denied tenure due to her sex and her age in violation of Title VII of the Civil Rights Act of 1964, 42 U. S.C. §2000e et seq, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1 98 1 a and the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. She also brings claims under 42 U.S.C. §1983 for violation of her First Amendment rights to

freedom of religion, equal protection, for procedural and substantive due process, and breach of contract. The plaintiff subsequently dismissed her claim of religious discrimination. The action is currently before the undersigned on the defendants' Motion for Summary Judgment (18), the plaintiff's Motion for Partial Summary Judgment (20), defendants' Motion to Strike (27); and defendants' Motion to Exceed Page Limitation (35).

PAGE LIMITATION

The defendants' Motion to Exceed Page Limitation is GRANTED. (35).

MOTION TO STRIKE

The defendants seek to strike paragraphs 18 and 20 of plaintiff's first affidavit on the basis that it is double hearsay. (27). Paragraph 18 of the affidavit clearly indicates that the statement is one based on statements by defendant Allen to other persons. It is unclear who Allen's statement in paragraph 20 was directed to, the plaintiff, or another group of persons which did not include the plaintiff. The plaintiff, in her response, asserts that these statements were made to her and are an admission of a party opponent. Based on the assertions by the plaintiff, the defendants' Motion to Strike is DENIED. (27)

MOTION FOR SUMMARY JUDGNENT
SUMMARY JUDGNMNT

Fed. R. Civ. P. 56© provides that summary judgment shall be rendered if "there is no genuine issue as to a material fact and [If] the moving party is entitled to

judgment as a matter of law." See, Young v. General Foods Corp, 840 F.2d 825 (11th Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

> [T]he plain language of Rule 56© mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be 'no genuine issue of material fact' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other factors immaterial.

Id, quoting, Celotex Corp. v Catrett, 477 U.S. 317, 322-23 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Where the evidence 's merely colorable or is not significantly probative summary judgment is appropriate. Id., citing, Anderson v Liberty Lobby, Inc., 477 U.S. 242 (1986). In determining whether the moving party has demonstrated that a genuine issue exists in the case, the court reviews the evidence and all facts in the case in the light most favorable to the party opposing the motion. Thrasher v State Farm Fire & Casualty Co.., 734 F.2d 637 (11th Cir. 1984). If the party seeking, summary judgment meets the initial burden of demonstrating that there is no genuine issue of material fact, the burden then shifts to the non-moving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. Avirgan v. Hull, 932 F.2d 1572 (11th

Cir. 1991), cert. denied, 502 U.S. 1048, (1992). A non-moving party opposing a summary judgment motion which is supported by affidavits cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial. Id. Furthermore, the evidence cannot consist of conclusory allegations or legal conclusions. Id.

ELEVENTH AMENDMENT

The defendants move for summary judgment based on Eleventh Amendment immunity as to the plain6ffs claims for monetary relief The state and state officials, where the state is the real party in interest, are not proper defendants in a §1983 action since the state is protected by the Eleventh Amendment. Pennhurst State-School & Hosp, v. Halderman, 465 U.S. 89 (1984). However, the Eleventh Amendment does not bar suits for equitable relief against state officials in their official capacity, nor does it bar damages awards against state officials in their individual capacities. Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989); See, Hafer v. Melo, 502 U.S.21 (1991). Thus, to the extent that the plaintiff seeks equitable damages against the Board and state officials in their official capacity, the Eleventh Amendment would not bar the suit. Thus, IT IS RECOMMENDED THAT the defendants' Motion for Summary Judgment on this ground be GRANTED.

DUE PROCESS

The plaintiff maintains that she was terminated and denied tenure in violation of her due process rights. The defendants move for summary judgment on the plaintiff s due

process claim. The plaintiff moves for partial summary judgment on this claim.[12]

Where a state creates a property right in continued employment, it may not constitutionally authorize the deprivation of the right without appropriate procedural safeguards. Cleveland Bd. of Educ, v. Loudermill, 470 U.S. 532 (1985); Reeves v Thigpen, 879 F.Supp. 1153 (M.D.Al. 1995). In Loudermill, the Supreme Court stated that some form of pre-termination hearing is required before a public employee can be discharged. This requirement is satisfied if the employee is given written or oral notice of the charges, an explanation of the employer's evidence, and an opportunity to present her side of the story. Loudermill, 470 U.S. at 545 - 46; Reeves, supra. A full evidently hearing is not required, especially where there is a method for post-termination review. Id. Due process also requires some sort of post-termination review, on a more formal level than the post-termination review. The employee must have the opportunity to confront and cross-examine his accuser in the presence of the decision maker, introduce evidence and present witness. See, Id.

However, before the due process requirements of the Fourteenth Amendment apply, the employee must have some

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[12] In her complaint the plaintiff raises a claim of substantive due process. It does not appear that she is arguing anything more than procedural due process at this time. However, to the extent she raises a claim for substantive due process in the employment setting, this claim is no longer viable in this Circuit. See, McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994); Guntharp v. Cobb County. Ga., 723 F.Supp. 771 (N.D.Ga. 1989).

property interest in employment. Board of Regents of State Colleges v Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). To have a property one must have more than an "abstract need or desire for it." Roth, 408 U.S. at 576. There must also be more than a unilateral expectation. Id. One must have "a legitimate claim of entitlement to it." Id. Property interests are created "by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577. The property interests in an appointment such as Gray's is defined by the terms of her appointment. Id. at 578. In Roth, the plaintiff obtained his first teaching job as an assistant professor at Wisconsin State University. He was hired for a fixed term of one academic year. Id. at 566. His appointment specifically indicated that his employment began on September 1, 1968, and would end on June 30, 1969. At the end of the first year, he was told that he would not be rehired for the next academic year. Id. The plaintiff had no tenure rights since he had taught only one year and no tenure could be acquired until after four years. There were no statutory or administrative standards defining eligibility for reemployment. Where, as with Roth, a non-tenured teacher was not dismissed during the academic year, but was merely not re-employed for the next year, and no reason for non-retention was required, no review or appeal were provided for. Thus, the court found that these facts did not give rise to any claim of entitlement to reemployment and would not create a property interest in employment sufficient to invoke due process protections. Id. at 578.

In Perry, the plaintiff argued that there was a de facto tenure policy arising from rules and understandings officially

promulgated that entitled him to an opportunity to prove his claim of job tenure. Id. The plaintiff had been employed for four successive years as a professor at a junior college on a series of one-year contracts. Perry, 408 U.S. at 594. When he became involved in public disagreements with the colleges Board of Regents, due to his 1968 appointment as president of the Texas Junior College Teachers Association, his contract was not renewed for the 1969-70 academic year. Id. at 595-96. The Court, citing its decision in Roth, noted that arguing that one was not rehired for one particular job, without more, did not amount to a showing of a loss of property, Id. at 599. However, the court found that questions of fact remained on whether there was a "de facto" tenure program at the college and that the plaintiff had tenure under that program. The plaintiff relied on a statement in the colleges Faculty Guide which indicated that there was not tenure system and that faculty members would have permanent tenure as long as his teaching services were satisfactory, he displayed a cooperative attitude toward co-workers and superiors, and was happy in his work. Id. at 599-600. The plaintiff also relied on guidelines by the Coordinating Board of the Texas College and University System that provided that anyone with seven years or more employment as a teacher in the Texas university system had some sort of job tenure. Id. at 600-601. The court found that such language and rules could supplement the tenure provisions and provide a property right in employment sufficient to invoke due process safeguards. Id. at 602.

In Stahell v. University of Mississippi, 854 F.2d 121 (11th Cir. 1988), the school had a tenure policy which allowed only the Chancellor to make tenure decisions. Id. at 123. Stahell maintained, however, that he had de facto tenure, in that he had met the specific standards of excellence

and that at his yearly reviews, which were required by the tenure policy, his department chairman assured him that his progress was satisfactory. He asserted that the specific standards in the policy, which he had met, along with the understanding from his department head, created an informal tenure obligation that over-rode the requirement that only the Chancellor could grant tenure. Id. The court disagreed, stating, "The institution of tenure has an inexorable internal logic: the very existence of a tenure system means that those teachers without tenure are not assured of continuing employment." Id., citing, Roth, supra. The court noted, that unlike the case of Perry where there was no official tenure policy, the plaintiff had pointed to circumstances possibly providing for a de facto one. Id. at 124, citing, Perry, supra. However, the court went on to note that in the case before it, the University had a formal, written and widely-circulated tenure policy and that representations by his department head that the plaintiff was progressing toward tenure did not create a consfitu6onally protected property interest where it was not shown that the school itself had entered into an agreement which would give rise to a protected interest. Id. at 125. Furthermore, even if Dr. Manley, the department head had spoken for the school, the court found no property interest arose, holding that where formal rules and informal understandings conflict, it is the formal rules which control such that informal and customary understandings cannot create a property interest in the face of formal rules. Id. citing, Batterton v. Texas General Land OEUM 783 F.2d 1220 (5th Cir.) cert. denied, 479 U.S. 914 (1986). Whatever expectations the plaintiff may have held, the court found that they could not be "constitutionally baptized" as a "'legitimate claim of entitlement.'" Id. at 126; See also, Wood v. University of Southern Mississippi 539 F.2d 529 (5th Cir. 1976)

In Press v Board of Regents of the University System of Georgia, 489 F.Supp. 150 (M.D.Ga. 1980), the court found that a university library administrator had no property interest in his employment where the one-year contracts signed by the administrator expressly negated future employment absent new and separate offers by the university. Id. The court noted that the University had a formal tenure system. Because the plaintiff had no claim of continued employment, the court found that he had no due process rights. Press, 489 F.Supp. at 153.

In the case at bar, the plaintiff was hired by the Board of Regents as an assistant professor at North Georgia College (NGC) in 1985. She had a B.A. and M.A. in philosophy. (Gray Depo. 16. 30-32, E.-.,h. 2). Each one-year contract that the plaintiff signed since her hiring, expressly negated future employment absent a new and separate offer by the Board of Regents. (Def. Exh. 3). Each contract also states that it was complete in and of itself and was amendable only in writing. Id. The plaintiff first applied for tenure in the 1989-90 academic year. (Gray Depo. 61). She withdrew her application after discussion the matter with Dr. Allen, who advised her that she would have a slim change without first completing a substantial portion of her course work toward a Ph.D. in mathematics, computer science or some other closely related field. (Allen Depo. 82-83; Gray Depo. 62). After teaching at NGC for seven years, the plaintiff was granted a leave of absence for the 1992-93 academic year to take graduate courses full-time at the University of Georgia. She was paid half of her salary during that year and was provided financial assistance to pay for her tuition. (Defendants' Statement of Material Facts; Plaintiff's Response to Defendants' Statement). Based on the

agreement, the plaintiff was to and did return to full-time teaching and applied for in the 1993-94 academic year. (Id; Allen Depo. 105, 207-1 Def. Exhs. 9, 10, 12). Allen maintains that returning to teaching for that year did not guarantee tenure. (Allen Depo. 106).

Section 803.09(F) of the Board of Regents Policy Manual states:

> The maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years, provided, however, that a terminal contract for an eighth year may be proffered if an institutional recommendation for tenure is not approved by the Board of Regents.

The plaintiff was aware of this policy in 1989. (Id.; Def. Exh. 6; Gray Depo. 60; See, Def Exh 8, NGC Faculty Handbook). The plaintiff maintains that there was an institutional understanding that this section provided automatic tenure if a faculty member served at the level of assistant professor or above for a period in excess of seven years. (Allen Depo. 96, 107). Allen testified that the policy of NGC was that the seven years had to be continuous, (Allen Depo. 96). The plaintiff taught for seven years prior to the one year off. She came back and applied for tenure in the 1993-94 year and the record reflects some confusion on whether she had a break during that time period or whether she was entitled to tenure automatically. (Allen Depo. 148-50.)

Section 803.09 of the Board of Regents Policy Manual sets out the minimum system wide requirements for

tenure. (Def. Exh. 6). In addition NGC also has tenure provisions. (Def. Exh. 7). The criteria for tenure at NGC are excellence in teaching, service to the NGC, academic achievement and professional growth with scholarly writings or other appropriate means, and five years of full-time service to the College. Excellence in two of the three areas and average or better in the third are required. Superior performance in teaching is essential, but otherwise there is no order of importance. (Id.). Tenure is awarded upon recommendation by the President and approval by the Board of Regents. (Def. Exhs. 6, 8). The procedure is for the applicant to prepare a letter and documentation seeking tenure with the department head, or the departmental promotions/tenure committee. This is then given to the Vice President for Academic Affairs and is held for certain deadlines of documentation to be met by the applicant. These are then given to the promotions/tenure committee chairman, who calls the committee together to review the application and documents. The committee makes the recommendation to the Vice President for Academic Affairs who then forwards the recommendation to the school President. The Academic V.P. has the prerogative to make recommendations to the President based on the recommendations that came to him from the committee, but can also make a recommendation opposite that from the committee. Both recommendations go to the President, who has the final determination power. (Allen Depo. 60-67). The President would, as far as Allen knew, always accept the recommendations of the Vice President and Committee. (Allen Depo. 68). Once the President makes the final decision, that is to grant tenure, this is forwarded to the Board of Regents for approval. (Allen Depo. 71).

The plaintiff was notified in September, 1993, that she would be awarded a contract for the 1994-95 school year "pending the decision of the tenure Committee as to whether or not you should be granted tenure." (Def. Exh. 20). The defendants did send the plaintiff a final contract for the 1994-95 school year, which was the ninth one-year teaching contract with the Board of Regent3. (Def. Exh. 20). The plaintiff wrote a letter to Dr. Allen on May 31, 1994, accepting the contract and stating her intention to challenge the denial of tenure. (Def. Exh. 21).

Dr. Jensen is a tenured professor at NGC and was the head of the math and computer sciences department during the time in question. (Jensen Depo. 13). Jensen did not recommend the plaintiff for tenure and believed that the plaintiff's teaching evaluations were below average. (Jensen Depo. 141-57; Def Exhs. 23-25). The plaintiff disputes that her teaching evaluations were below average. The Promotion and Tenure committee of the mathematics and Computer Science Department recommended that the plaintiff be granted tenure. (Def. Exh. 9). This was forwarded to the Institutional Promotions/Tenure Committee, on which Jensen was a member, that recommended that the plaintiff not be granted tenure. (Def. Exh. 10). Dr. Allen, President of NGC wrote a letter to the plaintiff advising her of this decision. (Def. Exh. 12). The plaintiff maintains that Allen did not concur in the decision, but indicated when made president that he would not interfere with decisions by the committee. (Gray Second Aff.). The plaintiff also maintains that Allen told her she could not appeal. (Gray Second Aff. Gray Depo. 101). Allen denies this. (Allen Depo. 70-71, 211-12). Gray received a final contract for 1994-95, and taught until late January, 1995, when she went on extended sick leave. (PI. Depo. 41; Def. Exh. 3). The plaintiff maintains that Noreen

Elliot, a 47 year old female was treated more favorably than she. Ms Elliott was hired as a temporary instructor in 1989, was made an assistant professor in 1990, and was denied tenure in 1996. (Def Exhs. 14, 15). The plaintiff believes that Jensen recommended that the plaintiff not be given tenure so that Elliott, a younger female, could receive tenure in the computer science department.

The plaintiff maintains that because she was given a contract for an eighth year, she was awarded de facto tenure or tenure by default. She asserts that based on Board of Regents Polices 803.09(F), if she is given the additional contract, she automatically had tenure. The plaintiff taught full-time for eight years prior to the 1994-95 contract year. She did not teach during the year of 1993-94, but took a one year leave of absence to study full time. She then taught full time in the 1993-94 school year, and was offered a ninth year in for 1994-95. Dr. Allen, the Dean, indicates in his deposition, "...a person could remain at North Georgia College forever as an assistant professor and could have tenure if the tenure promotions committee elected to give them tenure, but within the system I think by system mandate if a faculty member is not awarded tenure within the seventh year they get tenure automatically granted to them by mandate or policy from the system, that has been explored and discussed and I'm not sure in the system we know really what the policy is, but we're told if a faculty member is given the seventh contract most probably the system, the Board of Regents or Chancellor would grant them tenure." (Allen Depo. 56). He also stated, "If she has a period of seven years and she hasn't been 100 percent each of the years during that period of time, that would be -- those would be the only factors to determine whether or not she should be granted tenure." (Allen Depo. 107). Allen also indicated that he

believed that the plaintiff had taken a break prior to the time spent at the University of Georgia and prior to the end of her seven year period of teaching, (Allen Depo. 150), though he could find no documents concerning a previous break in teaching. (Allen Depo. 149-5 I). Faculty members' records were reviewed every six months to determine their status. (Allen Depo. 154). Allen also Indicated that the end of seven years did not mean that one received tenure automatically, but that one must generally be an assistant professor for five years and associate professor for five years to become a full processor. He acknowledged that there was nothing in the rules that required this, but that was what was generally done. (Allen Depo. 176-77). He stated that tenure was not automatically granted at the end of seven years, but that one might receive a promotion, but not tenure, or tenure without a promotion. (Allen Depo. 178). He went on to indicate concerning the seven year limitation of teaching without tenure- "I think that is certainly the interpretation by many, but at North Georgia College, [803.09]F, to my recollection , has never been tested. My interpretation is that if a faculty member is here without applying for tenure and resides or isn't picked up within seven years and there's been no break in time, yes, they're entitled to automatic tenure. But our contention, I think, looking at the records, that there has been a break and[sic] a 100 percent full-time employment at North Georgia College as a faculty member" (Allen Depo. 180, 183-84). Dr. Sisk indicated that she knew of no time other than the year that Gray took leave, that Gray was not a full-time faculty member. (Sisk Depo. 27). Gray may have had a special schedule in 1991 in which her teaching scheduled ended early so that she could take courses, but she did not take the course due to illness. (Sisk Depo. 28, 37-39, Jensen Depo. 198; Grey Depo. 153). Allen indicated that he believed he had the power to recommend to the Board of

Regents that Gray be given a tenured position if she had a full seven years of teaching, but would not do so. (Allen Depo. 186). Dr. Pearce testified that he raised the issue that Gray had already served for seven years with Dr. Allen and that this was the limit to time that one could serve, (Pearce Depo. 27). Dr. Pearce indicated that he spoke with Dr. Allen and that Allen had contacted the Chancellor's office and been told that the seven years was nothing to worry about at that time. (Pearce Depo. 28). He believed that Dr. Allen would make the tenure decision about the plaintiff and was unaware of the utilization of the usual tenure committee method. (Id).

Based on the facts set out above, the undersigned finds that questions remain concerning whether the plaintiff had de facto tenure after serving for seven years. There was some confusion whether the seven year rule required tenure or promotion or neither. There was also some question whether the plaintiff had breaks in full-time teaching, other than her year at the University of Georgia. Thus, IT IS RECOMMENDED THAT the plaintiff's and the defendants' Motions for Summary Judgment on this ground be DENIED.

The plaintiff maintains that since she had de facto tenure, she was denied tenure and terminated in violation of her due process rights. She asserts that she was not given any process by which to challenge the actual denial of the tenure because she was not told of an appeal process from the denial of tenure. (Gray Depo. 101-02). She also asserts that because she has de facto tenure, she was denied due process in her termination because she was not terminated pursuant to the requirements of 800.28(K). (Def. Exh. 6, 8). Thus, the undersigned finds that questions remain as to the plaintiff due process claims for her termination as well.

SEX DISCRIMINATION

The defendants move for summary judgment on the plaintiff's claims of sex discrimination in the denial of tenure which resulted in her termination. The defendants maintain that the plaintiff cannot prove a prima facie case and cannot rebut the non-discriminatory reasons given for the denial of tenure.[13] To establish a prima facie of discrimination in the denial of tenure the plaintiff must prove that she was a member of a protected group, she applied for tenure, she was qualified for tenure, and she was rejected under circumstances giving rise to an inference of unlawful discrimination. See, Isenbergh v Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996)(ADEA case) Mathew v Virginia Union University, 1992 WL 58504 (4th Cir. 1992)(unpublished opinion). Alternatively, a plaintiff may prove discrimination by evidence that other similarly situated employees were given tenure, while she was not. See, generally, Nix v WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984). The defendant must then produce some legitimate, non-discriminatory reason for the decision to deny tenure. Texas Dep't of Community Affairs v Burdine, 450 U.S. 248 (1981). The plaintiff must then show that the defendant's reasons were pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). That is, the plaintiff must prove that the reasons was false and that discrimination was the real reason for the

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[13] The plaintiff's claims under 42 U.S.C. §1983 fall within the same analysis as the plaintiff's Title VII claims. See, Guillory v. St. Landry Parish Police, 802 F.2d 822 (5th Cir. 1986); Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980).

denial of tenure. St. Mary's, supra. The burden of persuasion always remains with the plaintiff. Burdine, 450 U.S. at 253.

The plaintiff maintains that she was denied tenure due to her sex. She asserts that other similarly situated male employees were given tenure, while she was not and that all male employees of the department were given preferential treatment over the female members of the "math" portion of the department. (See Gray Depo. 142). The plaintiff maintains that Dr. Allen had promised that if she was making good progress with her Ph.D. that she would gain tenure. She discussed her progress with him and he indicated that it was good. The plaintiff maintains that he indicated that she would not receive the one years leave with half pay and chance to work on her doctorate if she was not going to be at the College for a long time. However, he did not award her tenure. (Gray Dep. 92-94, 97, 129). Prior to the denial of tenure, the plaintiff felt she may have been given more consideration than others in the Math and Computer Science Departments up until 1994, when she was not allowed to take an off-campus course by Dr. Jensen or Dr. Upchurch. (Gray Depo. 78-81). The plaintiff offered no specifics as to how the men in the department were given preferential treatment. She asserted that two males, Dr. Green and Dr. Woods, who had less seniority, were given tenure, while she was not. However, these two males had doctorate degrees, while the plaintiff did not. (Gray Depo. 124-1 Jensen Depo. 21-22, 57-58). She was also told by Dr. Allen that there was no appeal process from the denial of tenure. (Gray Depo. 100). Finally, she disputes the allegations that she received poor teaching reviews by students. (Gray Depo. I 1 5-21 -1 Jensen Depo. 13 9-43 She asserts that after Dr. Jensen told the other members of the College Committee on tenure that she was concerned about the plaintiff's teaching abilities, there was no

further discussion and that there was a unanimous secret vote against tenure. (Jensen Depo. 211-12).

The defendant maintains that the plaintiff has not shown that she was qualified for tenure. However, the tenure committee from her department recommended that she be given tenure. Thus, the undersigned finds that she was at least minimally qualified. Furthermore, even if it is only assumed that the plaintiff has set out a prima facie case, the plaintiff has not placed any facts in the record to support a claim that she was denied tenure due to her sex. While she asserts that males were treated differently and that two males who had less seniority received tenure, these two males were not similarly situated with the plaintiff. Furthermore, she set out no specific facts on how males received preferential treatment. While she disagrees with the findings by Dr. Jensen and the Committee who recommended that she be denied tenure and alleges that Dr. Allen promised her tenure, even if these allegations are taken as true, the plaintiff has not shown that these actions were based on factors other than those set out by the defendants or that the decision was in any way based on her sex. Thus, IT IS RECONE\4ENDED THAT the defendants' Motion for Summary Judgment on the plaintiff's Title VII and 42 U.S. C. § 1983 claims of sex discrimination be GRANTED.

AGE DISCRIMINATION

The plaintiff maintains that she was denied tenure because of her age. To establish a prima facie case of age discrimination, the plaintiff must show that she belongs to a protected class, she was qualified for tenure, that she was not give tenure despite her qualifications, and that she was rejected while other similarly situated younger employees

were treated differently . See, Isenbergh, supra, Mathew, supra, The defendant must then produce legitimate, nondiscriminatory reasons for not granting the plaintiff tenure. Isenbergh, 97 F.3d at 440. Once this burden is met, the plaintiff must prove that the reasons given given are a pretext for discrimination. id. at 441.

The plaintiff was over 40 years of age at the time of the denial of tenure. As indicated above, the undersigned finds that the plaintiff was at least minimally qualified for tenure and will assume that she has proven a prima facie case. The defendants maintain that the plaintiff was denied tenure because of problems with her teaching skills and the fact that she needed four more years of work to complete her Ph.D. (Def. Exhs. 17, 24, 25). Furthermore, the defendants maintain that, Elliot, who is four years younger than the plaintiff, and whom the plaintiff maintains Jensen wanted to have tenure instead of the plaintiff, did not receive tenure. She also asserts that she was denied tenure because of Jensen's concern for another younger female, King. However, King, never applied for tenure and left the college.

The plaintiff asserts that the defendants reasons are pretextual because Dr. Jensen preferred a younger woman, Elliott, over the plaintiff. She asserts that Dr. Jensen wanted Noreen Elliott to have tenure and because of the alleged structure of the department in which the math professors were all men and the computer science professors all women.. She asserts that Dr. Jensen admitted that the plaintiff was denied tenure because it would have impacted on Elliott's ability to attain tenure, as well as the ability of King to attain tenure. (Gray Depo. 142).

Neither Elliot, nor King, ever attained tenure. A review of Jensen's testimony indicates that it was not tenure that she was concerned with, but that due to the small number of people in the department she could not let the plaintiff take another year off for study when there were two other professors, Elliott and King, who wanted a leave to study as well and that giving the plaintiff tenure and allowing her to take off a year to finish her course work would be unfair. (Jensen Depo. 19799). This decision was based on a letter from a professor at the University of Georgia who indicated that the plaintiff needed one more year of course work before obtaining her Ph.D. and that it would take another four years to obtain her Ph.D. (Jensen Depo. 197-98). The fact that it would take the plaintiff four years to finish her Ph.D. and because the computer sciences department was the only department in the college without a faculty member with a Ph.D., as well as the plaintiff's problems with teaching, all were factors in Jensen's decision against tenure as a member of the tenure committee. Prior to being appointed to the committee, as the department head, Jensen wrote a letter setting out the positive aspects of the plaintiff's performance, but did not write a letter recommending tenure. (Jensen Depo. 203, 206-07, 211-13). While the committee in the plaintiff's department recommended her for tenure, the college committee, on which Jensen was a member, did not do so, and Jensen was not alone in voting for the denial. The plaintiff has put forth no facts to indicate that other members of the committee acted with discriminatory motives in making the decision. She appears to assert that Jensen's decision and failure to recommend her for tenure was based on discriminatory motives and that her actions influenced the other members to vote against her for tenure. The undersigned finds that the plaintiff has not shown that younger individuals were treated differently from her. The

undersigned also finds that the plaintiff has not rebutted the defendants' asserted reasons for the denial of tenure. While Jensen did state that it was her concern for other faculty members ability to take courses when the plaintiff had already been given such an opportunity and still needed another year of course work, was one basis for the decision, the plaintiff has not shown that this decision was based on the age of these persons, other than the plaintiff's own belief. Thus, the undersigned also RECOMMENDS THAT the defendant's Motion for Summary Judgment on the plaintiff's ADEA claims be GRANTED as well.

QUALIFIED IMMUNITY

The individual defendants seek qualified immunity from suit as to the plaintiff's claims of discrimination under 42 U.S.C. §1983. As indicated above, the undersigned recommends that summary judgment be granted as to the plaintiff's claims of sex and age discrimination. The plaintiff brings claims of the denial of due process against the individual plaintiffs as well. The defendants seek qualified immunity.

The Supreme Court has held that a state official may be held liable under §1983 for employment decisions made in his official capacity. Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). However, public employees and officials do enjoy qualified immunity against §1983 claims. Busby v, City of Orlando, 931 F.2d 764 (11th Cir. 1983). Where a defense of qualified immunity is available to a defendant, a plaintiff must establish a lack of objective good faith to avoid a directed verdict. id. The test for good faith is as follows:

> Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

quoting, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This standard shields all government officials except those who either are plainly incompetent or who knowingly violate the law,

> Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turn on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.

Id. quoting, Anderson v. Creighton, 483 U.S. 635 (1987). As long as the defendant could reasonably have thought his or her action to be consistent with the rights he or she is alleged to have violated, the defendant is entitled to immunity. id To be established clearly, a right must be so particularized that the unlawfulness must be apparent in light of the pre-existing law. For qualified immunity purposes, the subjective reasons for the actions of the defendant are immaterial. Hansen v. Soldenwagner, 19 F.3rd 573 (11th Cir. 1994).

While the undersigned has found that questions remain as to the plaintiff's claims of a due process violation, the undersigned also finds that the acts in denying her de facto tenure and dismissing her as a non-tenured employee

were not clearly unlawful. The portion of the documents relied on by the plaintiff in her claim of de facto tenure had not been at issue prior to this action and Dr. Allen indicated that there had never been a determination at North Georgia College of the meaning of the seven year requirement. Furthermore, there were questions of the time the plaintiff had spent off campus and her special schedules in previous years. Thus, the undersigned finds that the individual defendants, to the extent that such claims are raised against them, are entitled to qualified immunity as to the due process claims and RECOMMENDS THAT the Motion for Summary Judgment as to defendant Allen and Jensen's claims of qualified immunity be GRANTED.

BREACH OF CONTRACT

The defendants also move for summary judgment on the plaintiff's breach of contract claim. The plaintiff also moves for summary judgment on the breach of contract claim. The plaintiff maintains that there were oral and written promises of tenure. She asserts that her eighth regular contract as a full-time assistant professor, the Board's policy discussed above, as well as Allen's promise of tenure and the institutional understandings of tenure by both the faculty and the administration, all created a contract which was breached when she was denied tenure. The defendants deny that Allen promised the plaintiff tenure and that the only contracts involved are the year-to-year contracts which the plaintiff signed. The parties have sighted no Georgia cases to support their allegations that these factors did or did not create a contract. However, based on the facts as set out as to the due process claims, the undersigned finds that questions remain as to the breach of contract claim by the plaintiff. In Moffie v. Oblethorpe University, Inc., 186 Ga.

App. 328, 367 S.E.2d 112 (1988), the plaintiff alleged a breach of contract because data supporting the decision denying him tenure were not attached to the notice of denial. The Georgia Court of Appeals agreed, stating that since the faculty handbook dealing with consideration of tenure was incorporated into the yearly contract and was not followed, a breach occurred. However, the court found no damages for such a breach.. The court noted that all tenure track faculty members were terminated after their seventh year annual contract if such contract was issued without tenure. The court found that there was nothing allowing a reconsideration of the decision to deny tenure and that the plaintiff had been furnished a procedure in substantial conformity with the contractual provisions. As in Moffie, the faculty handbook is also incorporated into the plaintiff's yearly contact. The plaintiff was awarded yearly contracts past her seventh year. The handbook indicates that no one would continue without tenure after a seventh year. Thus, as indicated above, questions remain concerning the plaintiff's entitlement to tenure, and thus, her breach of contract claim as well. Thus, IT IS RECOMMENDED THAT the Motion for Summary Judgment by the defendants as to the plaintiff's breach of contract claim be DENIED. IT IS FURTHER RECOMMENDED THAT the Motion for Summaru Judgment by the plaintiff as to the breach of contract claim be DENIED.

SUMMARY

(1) IT IS HEREBY ORDERED THAT the defendants' Motion to Strike is DENMD (27).

(2) IT IS FURTHER ORDERED THAT the defendants' Motion to Exceed Page Limitation is GRANTED. (35).

(3) IT IS RECOMMENDED THAT the defendants' and the plaintiff's Partial Motions for Summary Judgment as to the plaintiff's claims of violation of due process and state claim of breach of contract be DENEED.

(4) IT IS FURTHER RECOMMENDED THAT the defendants' Motion for Summary Judgment based on Eleventh Amendment Immunity be GRANTED.

(5) IT IS FURTHER RECOMMENDED THAT the defendants' Motion for Summary Judgment as to the plaintiffs Title VII and Age Discrimination in Employment Act claims be GRANTED.

(6) IT IS FURTHER RECOMMENDED THAT the defendants' Motion for Summary Judgment based on qualified immunity be GRANTED.

IT IS SO ORDERED AND RECOMMENDED THIS, 23 Day of June, 1997.

/s/

UNITED STATES MAGISTRTE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

JILL GRAY,	:	
	:	
Plaintiff,	:	
	:	
V.	:	CIVIL NO. 2:95-CV-152
	:	WCO
	:	
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, DELMAS ALLEN, and ROSALIE JENSEN,	:	
	:	
Defendants.	:	

ORDER

The captioned case is before the court for consideration of the magistrate judge's report and recommendation (40-1). The report and recommendation was filed on June 25, 1997. The magistrate judge recommends granting in part and denying in part the parties' cross motions for summary judgment. The parties filed objections to the report and recommendation pursuant to 28 U.S.C. S 636(b)(1).

Plaintiff is a fifty-one year old woman formerly employed as an assistant professor at North Georgia College & State University ("NGC") . Plaintiff alleges that she was denied her right to procedural due process by defendants'

decision not to grant her tenure at NGC. Plaintiff further alleges that defendants' decision to deny her tenure was discriminatory on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 et seq., and on the basis of age in violation of the Age Discrimination in Employment Act ('ADEA') , 29 U.S. C. § 621 et seq. Plaintiff also alleges a state law breach of contract claim. The parties filed cross motions for summary judgment.

The magistrate judge recommends that summary judgment be granted to defendants on plaintiff's sex and age discrimination claims. The magistrate judge recommends that summary judgment be denied as to plaintiff's procedural due process claim and plaintiff's state law breach of contract claim.

Legal Analysis

1. Procedural Due Process

Plaintiff maintains she was terminated and denied tenure in violation of her procedural due process rights. The issue is whether plaintiff had a property interest in continued employment at NGC sufficient to invoke the protections of the Fourteenth Amendment to the United States Constitution. The magistrate judge found that questions of fact existed as to whether plaintiff had de facto tenure after completing her seventh year of employment as an assistant professor. The undersigned respectfully disagrees.

Plaintiff was hired by the Board of Regents as an assistant professor at NGC in the Mathematics and Computer Science Department in September, 1985. Plaintiff had a B.A.

and M.A. in philosophy. As a non-tenured assistant professor, plaintiff was issued a one-year employment contract each academic year. Each contract, including the last, contained the following provision:

> I UNDERSTAND THAT AT THE EXPIRATION OF THE TERM OF THIS CONTRACT I WILL NOT BE REEMPLOYED UNLESS THERE IS A NEW AND SEPARATE OFFER BY THE BOARD OF REGENTS ON BEHALF OF NORTH GEORGIA COLLEGE AND ACCEPTANCE THEREOF BY ME.

In addition, each contract, including the last, contained the following provision:

> I HEREBY ACKNOWLEDGE THAT THIS CONTRACT AND THE ATTACHED EXHIBIT 'A' CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND SHALL NOT BE CHANGED, MODIFIED, AMENDED, WAIVED OR DISCHARGED EXCEPT BY AN INSTRUMENT IN WRITING SIGNED BY THE PARTIES HERETO.

Defendants' Motion for Summary Judgment, Exhibit 3.

Plaintiff first applied for tenure during the 1989-90 academic year. Plaintiff discussed her application with defendant Dr. Delmas Allen who was then Vice President of Academic Affairs. On the advice of Dr. Allen, plaintiff withdrew her 1989-90 application for tenure in order to first

pursue an advanced degree in either mathematics, computer science, or some other closely related field.

After completing her seventh year of teaching, plaintiff was granted a leave of absence during the 1992-93 academic year to attend graduate courses full-time at the University of Georgia. Plaintiff taught no classes during this time period but was paid half her salary and also received financial assistance to help pay her tuition.

Plaintiff returned to NGC to full-time teaching under an eighth contract for the 1993-94 academic year. During that year, plaintiff again applied for tenure. The Promotion and Tenure Committee of the Mathematics and Computer Science Department recommended that plaintiff be granted tenure. Their recommendation was forwarded to the Institutional Promotions/Tenure Committee for its consideration. The Institutional Promotions/Tenure Committee recommended that plaintiff not be granted tenure.

Dr. Allen, who was then President of NGC, concurred with the Institutional Committee's recommendation not to grant plaintiff tenure and he so advised plaintiff in a letter dated January 25, 1994. Plaintiff did not appeal Dr. Allen's decision to the Board of Regents. Plaintiff alleges that Dr. Allen advised her that she had no right of appeal. Defendants dispute that such a statement was made.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). As stated above, the issue before the court is whether plaintiff had a property interest in continued employment at NGC

sufficient to invoke procedural due process protection. The law in this area is governed by two United States Supreme Court decisions involving professors at public colleges. See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

In Roth, the Supreme Court held that Mr. Roth, who was hired under a one-year teaching contract at Wisconsin State University-Oshkosh and was not rehired for the following academic year, did not have a property interest in reemployment sufficient to invoke the protections of the Fourteenth Amendment. Roth, 408 U.S. at 578. In the Sindermann case, Mr. Sindermann had been a teacher in the Texas state college system for ten years under a series of one-year contracts before the Board of Regents voted not to offer him a new contract for the following academic year. Sindermann, 408 U.S. at 594-95. The Supreme Court first held that Mr. Sindermann had not yet shown that he had been deprived of an interest that could invoke procedural due process protection. Id. at 599. However, the Supreme Court further held that his allegations did raise a genuine issue as to his interest in continued employment at Odessa Junior College where he had been teaching for his final four years of employment. Id. Mr. Sindermann alleged that the college had a de facto tenure program and that he had tenure under that program. Id-, at 600. The Supreme Court determined that there could be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. Sindermann, 408 U.S. at 602.

The Roth decision is clear that without the concept of de facto tenure or special circumstances creating a property interest in continued employment, a one-year teaching contract does not create a property interest sufficient to

invoke the protections of the Fourteenth Amendment. Consequently, plaintiff relies upon the Sindermann decision and the concept of de facto tenure in an effort to support her procedural due process claim. However, the Supreme Court in Sindermann did not hold that Mr. Sindermann had de facto tenure, the Court simply held that his allegations were sufficient to raise a genuine issue as to the concept of a de facto tenure system at Odessa Junior College. Plaintiff in the instant case has failed to create a genuine issue as to the existence of de
factor tenure at NGC.

Plaintiff points to § 803.09(F) of the Board of Regents Policy Manual in support of her argument of de facto tenure. That section provides in relevant part:

> The maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years, provided, however, that a terminal contract for an eighth year may be proffered if an institutional recommendation for tenure is not approved by the Board of Regents. ...

Defendants' Motion for Summary Judgment, Exhibit 6. Plaintiff maintains that there was an institutional understanding that § 803.09(F) provided automatic tenure if a faculty member served at the level of assistant professor or above for a period in excess of seven years. Plaintiff's argument is unpersuasive.

Section 803.09(F) does not mention de facto tenure. Moreover, it is a subsection of the tenure award policy set forth in detail in the Board of Regents Policy Manual. The Supreme Court in Sindermann noted that the possibility of de

facto tenure was more likely in a college or university with no explicit tenure system. Sindermann, at 602. In contrast, NGC has a clearly delineated tenure review process which provides no assurance that professors without tenure will be entitled to continued employment and leaves no room for claims of de facto tenure.

Section 803.09 of the Board of Regents Policy Manual sets out the minimum system wide requirements for tenure. In addition, NGC also has tenure provisions. The criteria for tenure at NGC are excellence in teaching, service to NGC, academic achievement and professional growth with scholarly writing or other appropriate means, and five years of full-time employment at NGC. Excellence in two of the three areas and average or better in the third are required. Superior performance in teaching is essential, but otherwise there is no order of importance.

The application procedure for tenure begins with the applicant submitting a letter seeking tenure and supporting documentation to the departmental promotions/tenure committee. This committee then reviews the application and supporting documentation. Once the departmental committee completes its review it forwards the application and its recommendation regarding tenure to the Institutional Promotions/Tenure Committee. The Institutional Committee then conducts its own review and makes its recommendation to the Vice President for Academic Affairs. The Vice President for Academic Affairs forwards the two prior recommendations to the President and also has the prerogative to submit his or her own recommendation to the President. The President then makes the decision to award or deny tenure; that decision, however, is subject to the Board of Regents' approval. In essence, the Board of Regents has

the final authority over the tenure process pursuant to the Board of Regents Policy Manual.

Accordingly, based upon the foregoing discussion, the court finds that plaintiff did not have a property interest in continued employment at NGC sufficient to invoke procedural due process protection. Board of Regents v. Roth, 408 U.S. 564 (1972) ; Perry v. Sindermann, 408 U.S. 593 (1972) . See also Flemm v. Board of Regents of the University System of Georgia, 1:91-CV-1359-RHH (N.D. Ga. December 12, 1991) (court rejected plaintiff's claim that he was entitled to tenure by default). The court finds that no genuine issues of material fact exist as to plaintiff's procedural due process claim. Fed.R.Civ.P. 56(c). Accordingly, defendants' motion for summary judgment is hereby GRANTED as to plaintiff's procedural due process claim and plaintiff's motion for summary judgment is hereby DENIED as to plaintiff's procedural due process claim.

2. Discrimination on the Basis of Sex

With respect to plaintiff's claim of discrimination on the basis of sex, the court finds that the report and recommendation contains a thorough and comprehensive discussion of the underlying facts, as well as the applicable legal standards. Therefore, in an effort to avoid duplication, this court will not reiterate those facts or legal principles herein.

The court is satisfied that the report and recommendation is accurate as both a matter of fact and law as to plaintiff's claim of discrimination on the basis of sex. The magistrate judge's report and recommendation is hereby

ADOPTED as the order of this court with respect to that claim.

3. Discrimination on the Basis of Age

With respect to plaintiff's claim of discrimination on the basis of age, the court finds that the report and recommendation contains a thorough and comprehensive discussion of the underlying facts, as well as the applicable legal standards. Therefore, in an effort to avoid duplication, this court will not reiterate those facts or legal principles herein.

The court is satisfied that the report and recommendation is accurate as both a matter of fact and law as to plaintiff's claim of discrimination on the basis of age. The magistrate judge's report and recommendation is hereby ADOPTED as the order of this court with respect to that claim.

4. Immunity

Defendants also move for summary judgment based on Eleventh Amendment immunity and qualified immunity. Because the court has dismissed plaintiff's federal and constitutional claims, the aforementioned immunity issues are now moot.[1] Accordingly, defendants' motion for summary judgment on the grounds of immunity is hereby DENIED AS MOOT.

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[1] Although plaintiff alleged an equal protection claim in Count IV of her complaint, that claim is no longer pending before the court in that it has not been addressed by any of the parties.

5. Breach of Contract

Plaintiff alleges that there were oral and written promises of tenure. Plaintiff asserts that her eighth regular contract as a full-time assistant professor, the Board's policy discussed above, Allen's alleged promise of tenure and the institutional understandings of tenure by both faculty and the administration, all combined to create a contract which was breached when she was denied tenure. The magistrate judge found that "questions remain concerning the plaintiff's entitlement to tenure, and thus, her breach of contract claim as well." The undersigned respectfully disagrees.

As stated above, the successive one-year employment contracts signed by plaintiff expressly negated future employment absent a new and separate offer by the Board of Regents. Moreover, the contracts clearly stated that the contract and the attached Exhibit 'A' constitute the entire agreement between the parties and shall not be changed, modified, amended, waived or discharged except by an instrument in writing signed by the parties hereto." See Defendants' Motion, Exhibit 3. No written amendment was made to any of plaintiff's employment contracts. Plaintiff has not produced any other employment contract. Moreover, none of the factors which plaintiff asserts create the alleged contract can override the ultimate authority of the Board of Regents to approve or disapprove a President's award of tenure. Accordingly, defendants' motion for summary judgment is hereby GRANTED as to plaintiff's state law breach of contract claim.

Summary

The magistrate judge's report and recommendation is hereby ADOPTED IN PART as the order of this court [40-1]. Defendants' motion for summary judgment is hereby GRANTED [18-1]. Plaintiff Is motion for partial summary judgment is hereby DENIED [20-1].

IT IS SO ORDERED this 23 of July, 1997.

/s/

WILLIAM C. O'KELLEY
Senior United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8902

JILL GRAY,

Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNINIERSTTY SYSTEM OF GEORGIA; DELMAS ALLEN, in both his official and individual capacity, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

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BEFORE: EDMONDSON and CARNES, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Jill Gray, is ___ denied.*

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

* Judge Clark would grant the petition for rehearing. He dissents from the denial of the petition for rehearing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8902

JILL GRAY,

Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNINIERSTTY SYSTEM OF GEORGIA; DELMAS ALLEN, in both his official and individual capacity, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(opinion _____, 11th Cir., 19___, _____ F.2d _____) .

Before: EDMONDSON and CARNES, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of Rehearing En Banc are DENIED.*

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE

* Judge Clark would grant the petition for rehearing. He dissents from the denial of the petition for rehearing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8902

JILL GRAY,

Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNINIERSTTY SYSTEM OF GEORGIA; DELMAS ALLEN, in both his official and individual capacity, et al.,

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On Appeal from the United States District Court for the Northern District of Georgia

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J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

CLARK, Senior Circuit Judge, dissented and filed an opinion.

ISSUED AS MANDATE: Nov 12 1998

*803.09 TENURE FOR TYPES 1, III AND III (see Section 203.01)

1/13/93 A. It is intended that these tenure policies shall be the minimum standard for award of tenure, but they are to be sufficiently flexible to permit an institution to make individual adjustment to its own peculiar problems or circumstances. These policies are to be considered a statement of general requirements which are capable of application throughout the System and are not a limitation upon any additional standards and requirements which a particular institution may wish to adopt for its own improvement. Such additional standards and requirements, which must be consistent with the Regents' Policies, and approved by the Board of Regents, shall be incorporated into the statutes of an institution.

B. Tenure resides at the institutional level. Institutional responsibility for employment of a tenured individual is to the extent of continued employment on a one hundred percent workload basis for three out of every four consecutive academic quarters until retirement, dismissal for cause, or release because of financial exigency, or program modification as determined by the Board (see Section 803.0901).

C. Normally, only assistant professors, associate professors, professors who are normally employed full-time (as defined by Regents' Policies) by an institution re eligible for tenure.

However, faculty members holding these professorial ranks who are employed by or on the staff of the Medical College of Georgia (MCG) on less than a full-time basis, and who also hold an appointment at the Veterans Administration Medical Center-Augusta, shall be eligible for promotion and/or the award of tenure by the Board of Regents. (BR Minutes, 1979-80, p. 73; 1980-81, p. 303; 1990-91, pp. 369-70)

The term "full-time" is used in these tenure regulations to denote service on a one hundred percent work load basis for at least three out of four consecutive academic quarters.

Faculty members with adjunct appointments shall not acquire tenure. The award of tenure is limited to the above academic ranks and shall not be construed to include honorific appointments. (BOR Minutes, 1990-91, pp. 369-70)

D. Tenure may be awarded, upon recommendation by the president and approval by the Board of Regents, upon completion of a probationary period of at least five years of full-time service at the rank of assistant professor or higher. The five year period must be continuous except that a maximum of two years interruption because of a leave of absence or part-time service may be permitted; provided, however, that no probationary credit for the period of an interruption shall be allowed. A maximum of

three years' credit toward the minimum probationary period may be allowed for service in tenure track positions at other institutions or for full-time service at the rank of instructor or lecturer at the same institution. Such credit for prior service shall be defined in writing by the president and approved by the Board of Regents at the time of the initial appointment at the rank of assistant professor or higher. (SR Minutes, 1983-84, p. 94)

E. Anything in these Policies to the contrary notwithstanding, faculty members employed by the Medical College of Georgia (MCG) who hold a professorial rank in a tenure track position of Assistant Professor or above who also hold a part-time or full-time appointment at the veterans Administration Medical Center-Augusta (VA), shall an stated above (Section 803.09-C) be eligible for the award of tenure at MCG upon completion of at least five years of full-time or part-time service at the rank of assistant professor or higher. Such faculty members shall otherwise meet the same probationary periods, criteria for promotion, procedures and other requirements set forth in the Policies and Bylaws of the Board of Regents and Statutes of MCG for the award of tenure to full-time faculty; provided, however, that such faculty members who have been employed previously by MCG for five consecutive years or more shall be eligible to apply for tenure. The tenure of a faculty member who also holds a VA appointment

shall apply only to that portion of a faculty member's salary and benefits which are provided directly by MCG. In no event shall the award of tenure to faculty members holding such joint appointments obligate MCG to assume any portion of the salary or other benefits provided by the VA. in the event a faculty member who has been awarded tenure at MCG under the provisions of this section shall for any reason cease to be employed by the VA, the medical college shall have the right, at its sole discretion, to revoke the tenure, employment or other affiliation of the faculty member by MCG without a hearing or other due process procedures or requirements set forth in the bylaws and Policies of the Board of Regents and the Statutes of MCG for other full-time tenured faculty. After termination of employment or revocation of tenure, MCG shall not be obligated to provide such faculty members with any further salary, benefits or other financial support.

F. The maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years, provided, however, that a terminal contract for an eighth year may be proffered if an institutional recommendation for tenure is not approved by the Board of Regents. The maximum time that may be served in any combination of full-time instructional appointments (instructor or professorial ranks) without the award of tenure shall be ten years, provided, however, that a

terminal contract for an eleventh year may be proffered if an institutional recommendation for tenure is not approved by the Board of Regents. (BR minutes, 1992-93, p. 288)

G. The maximum period of time that may be served at the rank of full-time instructor shall be seven years.

H. Tenure or probationary credit towards tenure is lost upon resignation from an institution, or written resignation from a tenured position in order to take a non-tenured position, or written resignation from a position for which probationary credit toward tenure is given in order to take a position for which no probationary credit is given. in the event such an individual is again employed as a candidate for tenure, probationary credit for the prior service may be awarded in the same manner as for service at another institution.

I. Upon approval of the award of tenure to an individual by the Board of Regents, that individual shall be notified in writing by the president of his institution, with a copy of the notification forwarded to the Chancellor.

J. Notice of the intention to renew or not to renew a non-tenured faculty member who has been awarded academic rank (instructor, assistant professor, associate professor, professor) shall be furnished, in writing, according to the following schedule:

1. at least three months before the date of termination of an initial one-year contract;
2. at least six months before the date of termination of a second one-year contract;

3. at least nine months before the date of termination of a contract after two or more years of service in the institution.

This schedule of notification does not apply to persons holding temporary or part-time positions in whatever rank stated.

K. A tenured faculty member, or a non-tenured faculty member, before the end of his contract term, may be dismissed for any of the following reasons provided that the institution has complied with procedural process requirements;

1. Conviction or admission of guilt of a felony or of a crime involving moral turpitude during the period of employment--or prior thereto if the conviction or admission of guilt was willfully concealed;

2. Professional incompetency, neglect of duty, or default of academic integrity in teaching, in research, or in scholarship'.

3. unlawful manufacture, distribution, sale, use or possession of marijuana, a controlled substance, or other illegal or dangerous drugs as defined by Georgia laws; teaching or working under the influence of alcohol which interferes with the faculty members performance of duty or his responsibilities to the institution or to his profession; (BR Minutes, 1989-90, pp. 384-385)

4. Conviction or admission of guilt in a court proceeding of any criminal drug offense; (BR minutes, 1989-90, pp. 384-385)

5. Physical or mental incompetency as determined by law or by a medical board of three or more licensed physicians and reviewed by a committee of the faculty;

6. False swearing with respect to official documents filed with the institution;

7. Disruption of any teaching, research, administrative, disciplinary, public service or other authorized activity;

8. Such other grounds for dismissal as may be specified in the statutes of the institution.

L. Each institution, as a part of its statutes, may supplement Regents' policies governing causes for dismissal and procedures for dismissal. Each institution should provide for standards governing faculty conduct, including sanctions short of dismissal, and procedures for the implementation of such sanctions. In the imposition of sanctions, the burden of proof lies with the institution.

(BR Minutes, 1951-S2, pp. 315-19, pp. 159-60; 1966-67, p. 206; 1969-70, pp.21-22; 1974-75, pp. 304-13; 198283, p. 254).

1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association Of University Professors and of the Association of American Colleges (now the Association of American Colleges and Universities) agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

The 1940 Statement is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges in 1969. The governing bodies of the two associations, meeting respectively in November 1989 and January 1990, adopted several changes in language in order to remove gender-specific references from the original text.

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher[14] or the institution as

[14] The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.[1]15

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

ACADEMIC FREEDOM

(a) Teachers are entitled to full freedom in research and in the publication of the results. subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their

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[15] Bold-face numbers in brackets refer to Interpretive Comments which follow.

subject.[2] Limitation of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.[3]

(c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institutional.[4]

ACADEMIC TENURE

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

1. The precise terms and conditions of every appointment should be stated in writing and be

in the possession of both institution and teacher before the appointment is consummated.

2. Beginning with appointment to the rank of full-time instructor or a higher rank,[5] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution, it may be agreed in writing that the new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years.[6] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.[7]

3. During the probationary period a teacher should have the academic freedom that all other members of the faculty have.[8]

4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and

should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompanied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher's own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.[9]

5. Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

1940 INTERPRETATIONS

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7-8,1940, the following interpretations of the 1940 *Statement of Principles on Academic Freedom and Tenure* were agreed upon:

1. That its operation should not be retroactive.

2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925

Conference Statement on Academic Freedom and Tenure.

3. If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph (a)(4) of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

1970 INTERPRETIVE COMMENTS

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the, basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the Statement in terms of the experience gained in implementing and applying the Statement for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration the following –"Interpretive Comments." These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty-sixth Annual Meeting as Association policy.

In the thirty years since their promulgation, the principles of the 1940 *Statement of Principles on Academic Freedom and Tenure* have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 Statement, to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 Statement is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 Statement: particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in Keyishian v. Board of Regents 385 U.S. 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of

transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classrooms."

The numbers refer to the designated portion of the 1940 Statement on which interpretive comment is made.

1. The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to professors in their utterances as citizens, in the exercise of their responsibilities to the institution and to students, and in their conduct when resigning from their institution or when undertaking government-sponsored research. Of particular relevance is the Statement on Professional Ethics, adopted in 1966 as Association policy. (A revision, adopted in 1987, was published in Academe: Bulletin of the AAUP 73 [July – August 1987]:49.)

2. The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.

3. Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure.

4. This paragraph is the subject of an interpretation adopted by the sponsors of the 1940 Statement immediately following its endorsement which reads as follows:

> *If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it ma proceed to file charges under paragraph (a)(4) of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.*

Paragraph (c) of the section on Academic Freedom in the 1940 Statement should also be interpreted in keeping with the 1964 "Committee A Statement on Extramural Utterances" (AAUP Bulletin 51 [1965): 29), which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should

take into account the faculty member's entire record as a teacher and scholar."

Paragraph V of the Statement on Professional Ethics also deals with the nature of the "special obligations" of the teacher. The paragraph reads as follows:

> *As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of other obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity. professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.*

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary and the tenured teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities.

5. The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full-time load regardless of the teacher's specific title.*

6. In calling for an agreement "in writing" on the amount of credit given for a faculty member's prior service at other institutions, the Statement furthers the general policy of full understanding by the professor of the terms and conditions of the appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution.**

7. The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 Statement with respect to the termination of service of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

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* For a discussion of this question. see the "Report of the Special Committee on Academic Personnel Ineligible for Tenure," AAUP Bulletin 52 (1966): 280-82.

** For a more detailed statement on this question, see "On Crediting Prior Service Elsewhere as Part of the Probationary, Period," AAUP Bulletin 64 (1978): 274-75.

The general principle of notice contained in this paragraph is developed with greater specificity in the Standards for Notice of Nonreappointment, endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

(1) *Not later than March 1 of the first academic year of service*, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

(2) *Not later than December 15 of the second academic year of service*, it the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

(3) At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and of individuals, are described in the Statement on Recruitment and Resignation of Faculty Members, as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

8. The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the Recommended Institutional Regulations on Academic Freedom and Tenure, prepared by the American Association of University Professors.

9. A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the Statement on Procedural Standards in Faculty Dismissal Proceedings, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 *Statement* is silent.

The 1958 *Statement* provides: "Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member's continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply

warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.

ENDORSERS

Association of American Colleges and Universities 1941
American Association of University Professors 1941
American Library Association (adapted for librarians). 1946
Association of American Law Schools 1946
American Political Science Association 1947
American Association of Colleges for Teacher Education 1950
American Association for Higher Education 1950
Eastern Psychological Association 1950
Southern Society for Philosophy and Psychology 1953
American Psychological Association 1961
American Historical Association 1961
Modem Language Association of America 1962
American Economic Association 1962
American Agricultural Economics Association 1962
Midwest Sociological Society 1963
Organization of American Historians 1963
American Philological Association 1963
American Council of Learned Societies 1963
Speech Communication Association 1963
American Sociological Association 1963
Southern Historical Association 1963
American Studies Association 1963
Association of American Geographers 1963
Southern Economic Association 1963

Classical Association of the Middle West and South.... 1964
Southwestern Social Science Association 1964
Archaeological Institute of America 1964
Southern Management Association 1964
American Theatre Association 1964
South Central Modem Language Association 1964
Southwestern Philosophical Society 1964
Council of Independent Colleges 1965
Mathematical Association of America 1965
Arizona-Nevada Academy of Science 1965
American Risk and Insurance Association 1965
Academy of Management 1965
American Catholic Historical Association 1966
American Catholic Philosophical Association 1966
Association for Education in Journalism 1966
Western History Association 1966
Mountain-Plains Philosophical Conference 1966
Society of American Archivists 1966
Southeastern Psychological Association 1966
Southern Speech Communication Association 1966
American Association for the Advancement
of Slavic Studies 1967
American Mathematical Society 1967
College Theology Society 1967
Council on Social Work education 1967
American Association of Colleges of Pharmacy 1967
American Academy of Religion 1967
Association for the Sociology of Religion 1967
American Society of Journalism School
Administrators 1967
John Dewey Society 1967
South Atlantic Modem Language Association 1967
American Finance Association 1967
Association for Social Economics 1967

United Chapters of Phi Beta Kappa 1968
American Society of Christian Ethics 1968
American Association of Teachers of French 1968
Eastern Finance Association 1968
American Association for Chinese Studies 1968
American Society of Plant Physiologists 1968
University Film and Video Association 1968
American Dialect Society 1968
American Speech-Language-Hearing Association 1968
Association of Social and Behavioral Scientists 1968
College English Association 1968
National College Physical Education Association for Men 1969
American Real Estate and Urban Economics Association 1969
History of Education Society 1969
Council for Philosophical Studies 1969
American Musicological Society 1969
American Association of Teachers of Spanish and Portuguese 1969
Texas Junior College Teachers Association 1970
College Art Association of America 1970
Society of Professors of Education 1970
American Anthropological Association 1970
Association of Theological Schools 1970
American Association of Schools and Departments of Journalism 1971
American Business Law Association 1971
American Council for the Arts 1972
New York State Mathematics Association of Two-Year Colleges 1972
College Language Association 1973
Pennsylvania Historical Association 1973

Massachusetts Regional Community College Faculty Association 1973
American Philosophical Association *** 1974
American Classical League 1974
American Comparative Literature Association 1974
Rocky Mountain Modem Language Association 1974
Society of Architectural Historians 1975
American Statistical Association 1975
American Folklore Society 1975
Association for Asian Studies 1975
Linguistic Society of America 1975
African Studies Association 1975
American Institute of Biological Sciences 1975
North American Conference on British Studies 1975
Sixteenth-Century Studies Conference 1975
Texas Association of College Teachers 1976
Society for Spanish and Portuguese Historical Studies 1976
Association for Jewish Studies 1976
Western Speech Communication Association 1976
Texas Association of Colleges for Teacher Education .. 1977
Metaphysical Society of America 1977
American Chemical Society 1977
Texas Library Association 1977
American Society for Legal History 1977
Iowa Higher Education Association 1977
American Physical Therapy Association 1979
North Central Sociological Association 1980
Dante Society of America 1980
Association for Communication Administration 1981
American Association of Physics Teachers 1982
Middle East Studies Association 1982
National Education Association 1985
American Institute of Chemists 1985

American Association of Teachers of German 1985
American Association of Teachers of Italian 1985
American Association for Applied Linguistics 1986
American Association of Teachers
of Slavic and East European Languages 1986
American Association for Cancer Education 1986
American Society of Church History 1986
Oral History Association 1987
Society for French Historical Studies 1987
History of Science Society 1987
American Association of Pharmaceutical Scientists 1988
American Association for Clinical Chemistry 1988
Council for Chemical Research 1988
Association for the Study of Higher Education 1988
American Psychological Society 1989
University and College Labor Education Association .. 1989
Society for Neuroscience 1989
Renaissance Society of America 1989
Society of Biblical Literature 1989
National Science Teachers Association 1989
Medieval Academy of America 1990
American Society of Agronomy 1990
Crop Science Society of America 1990
Soil Science Society of America 1990
Society of Protozoologists 1990
Society for Ethnomusicology 1990
American Association of Physicists in Medicine 1990
Animal Behavior Society 1990
Illinois Community College Faculty Association 1990
American Society for Theatre Research 1990
National Council of Teachers of English 1991
Latin American Studies Association 1992
Society for Cinema Studies 1992
American Society for Eighteenth-Century Studies 1992

Council of Colleges of Arts and Sciences 1992
American Society for Aesthetics 1992
Association for the Advancement of Baltic Studies 1994
American Council of Teachers of Russian 1994
Council of Teachers of Southeast Asian Languages 1994
American Association of Teachers of Arabic 1994
Association of Teachers of Japanese 1994
Academic Senate for Colleges Community Colleges ... 1996
Council of Graduate Programs in
Communication Sciences and Disorders 1996

Supreme Court, U.S.
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No. 98-1246

In The

Supreme Court of the United States

October Term, 1998

JILL GRAY,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, DELMAS ALLEN, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND ROSALIE JENSEN, IN BOTH HER OFFICIAL AND INDIVIDUAL CAPACITIES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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22 pp

QUESTION PRESENTED

Whether a faculty member in a State university system that awards tenure only through a formal, written process achieves *de facto* tenure (1) if she fails to complete that process, but remains employed one year beyond the probationary period specified in the written procedure, and (2) by virtue of the verbal statements of one individual who lacks final authority to grant tenure.

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

Petitioner Jill Gray was hired by the Board of Regents of the University System of Georgia as an assistant professor in the Mathematics and Computer Science Department at North Georgia College, now North Georgia College and State University, in September, 1985. She came to the job with a B.A. and M.A. in philosophy and little teaching experience.

As a non-tenured assistant professor, Ms. Gray was employed pursuant to a series of one-year contracts until her non-renewal, which followed her failure to complete successfully the Board of Regents' formal tenure review process. Each employment contract contained the following provisions:

> I UNDERSTAND THAT AT THE EXPIRATION OF THE TERM OF THIS CONTRACT I WILL NOT BE REEMPLOYED UNLESS THERE IS A NEW AND SEPARATE OFFER BY THE BOARD OF REGENTS ON BEHALF OF NORTH GEORGIA COLLEGE AND ACCEPTANCE THEREOF BY ME. . . .
>
> I HEREBY ACKNOWLEDGE THAT THIS CONTRACT AND THE ATTACHED EXHIBIT 'A' CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND SHALL NOT BE CHANGED, MODIFIED, AMENDED, WAIVED OR DISCHARGED EXCEPT BY AN INSTRUMENT IN WRITING SIGNED BY THE PARTIES HERETO.

Section 803.09(D) of the Board of Regents Policy Manual, as well as Administrative Memoranda from the college and its faculty handbook, state that all tenure decisions are subject to final approval by the Board of Regents:

> Tenure may be awarded upon recommendation by the president and approval by the Board of Regents, upon completion of a probationary period of at least five years of full-time service at the rank of assistant professor or higher.

(Petition for Cert., pp. 60a-61a). Section 803.09(F) of the Board of Regents Policy Manual states in pertinent part:

> The maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years, provided, however, that a terminal contract for an eighth year may be proffered if an institutional recommendation for tenure is not approved by the Board of Regents.

(Petition for Cert., pp. 62a-63a). Ms. Gray testified in deposition that she had been aware of these policies since 1989.

North Georgia College has in place formal procedures and criteria for tenure. The three main criteria for tenure are excellence in teaching, service and academic achievement and professional growth. Each year, faculty who are eligible for tenure and choose to apply may submit a dossier and document file, the contents of which are specified by the College, to their department heads. The Department Head forwards the materials to the

Department Promotion and Tenure Committee, which interviews the applicant, deliberates, and returns the materials to the Department Head with its written recommendation. The Department Head adds his own statement, and forwards the materials to the Vice President of Academic Affairs. The materials then go to the Institutional Promotion and Tenure Committee, which reviews them and makes a recommendation to the Vice President of Academic Affairs. The Vice President adds his own recommendation and forwards the materials to the College President for his consideration. The President's recommendations are forwarded to the Chancellor of the Board of Regents, whose own recommendations are sent to the Board for final approval of tenure.

Ms. Gray first applied for tenure during the 1989-90 academic year. On the recommendation of Dr. Delmas Allen, who was then Vice President for Academic Affairs, she withdrew her application. Dr. Allen advised her that she should seek a Ph.D. in mathematics, computer science, or some other closely related field before applying for tenure.

After teaching at North Georgia College for seven years, Ms. Gray was granted a leave of absence during the 1992-93 academic year to pursue her graduate studies full-time at the University of Georgia in Athens, Georgia. Ms. Gray taught no classes during that year but was paid half her salary and also received financial assistance from the Board of Regents to help pay her tuition.

Ms. Gray returned to full-time teaching at North Georgia College under an eighth contract for the 1993-94 academic year. During that year, Ms. Gray again applied

for tenure. In September, 1993, Ms. Gray was advised by the College that any contract she received for the 1994-95 academic year would be her final contract if she did not attain tenured status during the current year.

Ms. Gray's department head, Dr. Rosalie Jensen, did not recommend Ms. Gray for tenure based on Ms. Gray's below average teaching evaluations and student complaints about Gray that both she and Dr. Allen had received. The Promotion and Tenure Committee of the Mathematics and Computer Science Department, however, did recommend that Ms. Gray be awarded tenure. The departmental committee's decision was made prior to receipt of a letter to Dr. Allen from Ms. Gray's major professor at the University of Georgia, which indicated that it would take Gray approximately four more years, one of them as a full-time student, to complete her Ph.D. The departmental committee's recommendation was forwarded to the Institutional Promotions and Tenure Committee for consideration, which recommended, in a four-one vote, not to award Ms. Gray tenure.

Dr. Allen, President of North Georgia College since summer, 1993, advised Ms. Gray of his concurrence with the Institutional Promotions and Tenure Committee in a letter dated January 25, 1994. Ms. Gray did not appeal Dr. Allen's decision to the Board of Regents.

In May, 1994, Ms. Gray received and signed a contract for her ninth year of teaching at North Georgia College, marked "final contract." She served part of her contract for the 1994-95 academic year, and went on extended sick leave in January, 1995, until her contract expired in June, 1995.

In her Complaint, Ms. Gray alleged that Dr. Allen "repeatedly assured Plaintiff that tenure would be granted after she returned to Defendant college [from her leave of absence in 1993-94]." Ms. Gray made similar assertions in her Petition to this Court. (Petition for Cert., pp. 4, 8). Dr. Allen denied promising Ms. Gray tenure. In any event, each contract between Gray and the Board of Regents expressly negates any such promise or assurance by Dr. Allen.

Dr. Allen also gave deposition testimony that,

> My interpretation [of the Board of Regents Policies] is that if a faculty member is here without applying for tenure and resides or isn't picked up within seven years and there's been no break in time, yes, they're entitled to automatic tenure.

However, Ms. Gray was never treated or regarded as tenured by North Georgia College or the Board of Regents. The Board of Regents has never awarded tenure to a faculty member on the basis that he or she had been employed for more than seven years as a non-tenured professor, or on any other basis outside its formal, written procedures.

Now Ms. Gray petitions this Court to grant certiorari to review the order of the Eleventh Circuit Court of Appeals affirming summary judgment for the Board of Regents on Gray's claim of denial of procedural due process. She specifically complains that the Board refused to provide her a hearing before her release from employment when she failed to achieve tenure through Regents' formal tenure procedure. The Court of Appeals ruled that

Ms. Gray had no property right to continued employment, as she had not attained tenure, *de facto* or otherwise, at the time of her nonrenewal.

II. REASONS FOR NOT GRANTING THE WRIT

The Court of Appeals based its decision squarely on *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), two durable and far-reaching precedents that established the now settled law of procedural due process in the academic setting. The breadth of these two cases is sufficient to encompass the myriad factual situations that occur within the tenure review processes of academia, as well as a host of other contexts, as evidenced by the fact that they are relied upon in every case cited by Petitioner in her Petition for Certiorari.

A. The Court of Appeals decision is a restatement of the law of procedural due process as established in *Board of Regents v. Roth* and *Perry v. Sindermann*.

The reasoning and language of *Roth* and *Perry* have repeatedly provided sufficient guidance to the federal courts to review and decide procedural due process issues in academic employment cases. Likewise, *Roth* and *Perry* provided the Eleventh Circuit Court of Appeals with sufficient basis to decide Ms. Gray's case, the result being a well-reasoned order based on sound law. Because the law in *Roth* and *Perry* is clear, straightforward and easy to apply, there is no reason to grant certiorari in this

case, which simply illustrates a proper application by a circuit court of binding Supreme Court precedents.

Roth was employed on a year-to-year basis at Wisconsin State University at Oshkosh. He challenged the nonrenewal of his notice of appointment, the equivalent of an employment contract at his institution, after one year, on procedural due process grounds. The Supreme Court held that Roth had no constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. 408 U.S. at 569.

Ruling that Roth had no property interest protected by the due process clause of the Fourteenth Amendment, the Court explained, "[T]he range of interests protected by procedural due process is not infinite." *Id.* at 570. This is despite the "broad and majestic" nature of the term property, which is "among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience." *Id.* at 571. The Court went on to hold, "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Id.* at 576. In often-quoted language, the Court continued,

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> . . .
>
> Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

> understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

Perry v. Sindermann gave the Court an opportunity to flesh out the precepts established in *Roth*. Professor Sindermann taught for ten years at Odessa Junior College before his contract was not renewed without a hearing. Written policy at the College declared that there was no tenure system, but that "[t]he Administration of the College wishes the faculty member to feel that he has permanent tenure" so long as he cooperates with his department and the administration and is "happy in his work." 408 U.S. at 600. This policy was consistent with that of the Coordinating Board of the Texas College and University System, which provided for tenure after a probationary period of seven years in the System, with specific tenure procedures to be set forth by each institution. *Id.*

The Court remanded the case for a determination of Sindermann's rights under Texas contract law. It cited *Roth* to establish that Sindermann may have had a property right in continued employment in the form of *de facto* tenure, since his college lacked a formal tenure process. The Court contemplated the possibility that, in the absence of an express contract created by written tenure provisions evidencing a teacher's claim of entitlement to continued employment in the form of tenure, an implied contract may be in place under state law that would supplement other agreements and support the teacher's claim to a property interest in tenure. 408 U.S. at 602, n. 7.

The Court referred to "an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure[,]" which

> is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.

Id. at 602.

Judge Edmondson's decision in the instant case flows directly from the language and import of *Perry* and *Roth*. The decision of the Court of Appeals differentiated Ms. Gray's situation from that of Professor Sindermann by emphasizing that the Board of Regents had a formal tenure procedure which was the only way any faculty member had ever achieved tenure; that is, Regents institutions, including North Georgia College, had no "common law" tenure. This holding was despite the deposition testimony of President Allen that his interpretation of Regents' policy was that "automatic tenure" could be conferred on a faculty member who "is here without applying for tenure and resides or isn't picked up within seven years."[1] (Petition for Cert., p. 11a). The Court properly held,

> [A]s a matter of law, one administrator's stated 'interpretation' of the Board of Regents Policy

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[1] In fact, Ms. Gray had applied for tenure through the formal tenure review process twice, in the 1989-90 academic year, and in the 1993-94 academic year, when her application was denied by the Institutional Tenure and Promotion Review Committee. President Allen concurred in the denial, and Ms. Gray filed no appeal to the Board of Regents.

> Manual – an interpretation not based on concrete experience with someone actually getting tenure by default – cannot rise to the level of 'common law' of the university that Sindermann demands.

(Petition for Cert., p. 12a).

The court likewise dismissed Ms. Gray's argument that any assurances Allen may have made about Ms. Gray's progression toward tenure by taking courses at the University of Georgia created a property interest. (Petition for Cert., p. 12a, n. 9).

The facts remain that no faculty member at North Georgia College or elsewhere in the Regents System had ever achieved tenure through any other means than successful completion of the formal tenure review process, and that Ms. Gray was never treated or regarded as if she had achieved tenure. *Cf. Soni v. Board of Trustees*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) (holding that a faculty member who was prohibited by state statute from getting formal tenure had a property right in continued employment in the nature of tenure, where evidence showed he had been regarded and treated by University authorities as if he were tenured).

The Court of Appeals dismissed the proposal that Ms. Gray had been awarded tenure by the grant of an eighth-year contract by citing the language of the contract itself, which specified,

> I UNDERSTAND THAT AT THE EXPIRATION OF THE TERM OF THIS CONTRACT I WILL NOT BE REEMPLOYED UNLESS THERE IS A NEW AND SEPARATE OFFER BY THE BOARD

OF REGENTS ON BEHALF OF NORTH GEORGIA COLLEGE AND ACCEPTANCE THEREOF BY ME.

The court recognized the identity between Ms. Gray's employment contract and that of Roth, holding that, under the Supreme Court's decision in *Roth*, any property interest Ms. Gray was asserting in continued employment had to be created by the terms of the contract under state law, which clearly secured no interest in further employment, i.e., tenure.[2]

The Court of Appeals went on to hold that, in light of the language of the contracts between Ms. Gray and Regents, which specified that they were subject to Regents' Policies and could not be altered except in writing, getting an eighth-year contract was not the same as getting tenure or its equivalent. Regents' Policy, the North Georgia College faculty handbook and Administrative Memoranda specify that tenure is to be awarded upon approval of the Board of Regents. Section 803.09(D), Board of Regents Policy Manual (Petition for Cert., pp. 60a-61a). Regents' Policy provides that the maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years, except that an eighth-year contract may be proffered if an institutional recommendation for tenure is

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[2] As for the implied contract theory of *Perry v. Sindermann*, Georgia law holds that, while the State has waived sovereign immunity as to express contracts, it maintains its immunity as to implied contracts. *Board of Regents v. Tyson*, 404 S.E.2d 557 (Ga. 1991); *Culberson v. Fulton-DeKalb Hospital Authority*, 411 S.E.2d 75 (Ga. Ct. App. 1991). Therefore, the Board of Regents, an arm of the State of Georgia, cannot be bound by an implied contract.

disapproved by the Board of Regents. Board of Regents Policy Manual, 803.09 (F) (Petition for Cert., pp. 62a-63a). The Eleventh Circuit Court of Appeals quoted the Fifth Circuit's decision in *Staheli v. University of Mississippi*:

> The institution of a tenure system has an inexorable internal logic: the very existence of a tenure system means that those teachers without tenure are not assured of continuing employment.

854 F.2d 121, 124 (5th Cir. 1988).

The Court of Appeals wisely refused to twist that logic to conclude that the Board of Regents' failure to expressly rule out automatic tenure meant that it had conferred such status on Ms. Gray.

B. There is no conflict among the circuits on the question of *de facto* tenure, and any apparent conflict is inconsequential to the case *sub judice*.

What Petitioner characterizes as a circuit split on the question of *de facto* tenure is more aptly characterized as the variety of outcomes in the lower courts of applying settled law to the myriad factual situations that arise in colleges and universities as they employ their tenure procedures, formal or informal. In fact, all the cases cited in the Petition for Certiorari (pp. 14-15) lend support to the decision of the Court of Appeals in *Gray* and, like the *Gray* decision, are based on the law of procedural due process established in *Roth* and *Perry*.

Soni v. Board of Trustees stands out as the one case in which a court found that a faculty member at an institution that had a formal written tenure process nonetheless

had a property right in continued employment. What differentiates *Soni* from the other tenure cases is the strength of its facts: Dr. Soni literally was tenured, *de facto*. He was not permitted to have formal tenure under a Tennessee law and a University regulation that prohibited aliens from holding positions that were not classified temporary in any state school system. 513 F.2d at 349. He was informed of the law when he became eligible for tenure review, but was assured that he had permanent employment. He was permitted to participate in the University's retirement program, which was restricted to permanent faculty. *Id.* He attended departmental meetings and voted on tenure for other faculty members. *Id.* at 350. Dr. Soni's colleagues and his department head assured him that he would be regarded as tenured, and they treated him as tenured. Dr. Soni functioned as a tenured professor in every aspect, and was convinced by objective evidence that his lack of formal tenure was due only to the technicality of the state law. When he became a citizen and was denied formal tenure, the Sixth Circuit Court recognized his property right in continued employment based on the compelling facts of his case.

The nature of the property interest recognized in *Soni* exemplifies the description of property provided by the Supreme Court in *Roth*: "the security of interests *that a person has already acquired* in specific benefits." 408 U.S. at 576 (emphasis added). That Dr. Soni had already acquired a legitimate and objective expectation in continued employment with the University is evidenced by the indicia of tenure he enjoyed – participation in the retirement program for permanent faculty and voting rights in the department – and by his reliance on his permanent status:

he had purchased a home near the University. 513 F.2d at 350. ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* at 577.) Ms. Gray did not show that she had either acquired any indicia of tenure to support her assertion of a property interest in tenure at North Georgia College, nor did she show reliance on the *de facto* tenured status she alleged.

The Sixth Circuit cited the compelling facts of *Soni* to distinguish it from *Edinger v. Board of Regents*, 906 F.2d 1136 (6th Cir. 1990), cited by the Court of Appeals as support for its decision below. (Petition for Cert., p. 12a, n. 8). Although *Edinger* is cited in the Petition for Certiorari as in conflict with *Soni*, and is factually very different from *Soni*, the cases are legally consistent.

Dr. Edinger taught at Morehead State University for a total of eight years. University policy, like Regents' policy in the instant case, provided for a probationary period of not "more than five years" before its Board of Regents "may grant tenure." *Id.* at 1137. Each employment contract, as well as state law, provided that the grant of tenure was "subject to approval by the Board of Regents." *Id.* At the beginning of his fourth year, Dr. Edinger was given a terminal contract, after which he brought a lawsuit concerning his failure to be rehired for a fifth year. The lawsuit resulted in a settlement agreement under which Dr. Edinger was given another contract and promoted to full professor, but not granted tenure, although the two customarily occurred simultaneously. Dr. Edinger's sixth-year contract was erroneously marked "tenured." *Id.* at 1138. In the district court, Dr. Edinger

claimed that he had in fact been granted formal tenure, that he had "tenure by ratification" due to employment beyond the probationary period, and that he had *de facto* tenure under *Perry v. Sindermann*.

Dr. Edinger's first two theories failed, as did his argument for *de facto* tenure, with the court differentiating Dr. Edinger's case from *Perry v. Sindermann* on the basis of the existence of a formal tenure process at Morehead State University. Holding that Dr. Edinger's reliance on *Soni* was misplaced, the Sixth Circuit court quoted *Haimowitz v. University of Nevada* for the proposition that, "[T]he existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment absent extraordinary circumstances." 579 F.2d 526, 528 (9th Cir. 1978) (denying a claim to *de facto* tenure based on assurances of the plaintiff's colleagues that he was progressing well towards tenure, and distinguishing *Soni* on its facts.)[3] 906 F.2d at 1140.

The *Edinger* court discussed the "extraordinary circumstances" of Dr. Soni's case, as outlined above, and denied Dr. Edinger's claim to *de facto* tenure. The court pointed out that Dr. Soni had been recommended for a permanent faculty position, but that a formal vote had been deferred until he had obtained citizenship. He had been promoted from a visiting associate professor to an

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[3] The *Haimowitz* court held, "The entire thrust of formal tenure provisions is to standardize the process of faculty selection and employment security. In other words, formal tenure regulations are designed to avoid the *de facto* tenure problems recognized in *Perry*." *Id.*

associate professor[4] and given the prerequisites of tenure: participation in the retirement program for permanent faculty, inclusion in departmental meetings, and a vote on tenure for other faculty. Dr. Soni had been told repeatedly that once he obtained citizenship, he would get formal tenure. *Id.* In contrasting *Edinger* with *Soni*, the court commented, "[F]or all practical purposes Dr. Soni functioned as a tenured professor, was viewed as such by his colleagues, and was told that formal tenure was forthcoming." *Id. Soni* and *Edinger* are clearly distinguishable on their facts and do not illustrate a circuit split.

Jones v. University of Central Oklahoma, 13 F.3d 361 (10th Cir. 1993), is also cited by Petitioner to show a purported split among the circuits on the issue of *de facto* tenure. The *Jones* court indeed discerned "two general schools of thought" among the circuits as to *de facto* tenure. *Id.* at 363. However, in its discussion of *Soni* and *Haimowitz* as representative of each school, the court concluded that both were flawed by their failure to "define protectable property interests in the state-employment context solely through the application of state law." *Id.*[5]

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[4] Dr. Edinger's attempt to bolster his claim to *de facto* tenure by arguing that he, too, had been promoted was disallowed by the Sixth Circuit court, which recognized that the promotion was ordered by the court in his previous lawsuit against the Morehead State Board of Regents, and that the settlement agreement did not mention tenure. *Id.*

[5] The *Jones* court cites *Perry* at 602, n. 7, to support its rigid premise that the federal courts are to define property interests in state employment *"solely through the application of state law"* specifically tailored to tenure. 13 F.3d at 363, 365 (emphasis added). However, note 7 refers to *Roth's* more expansive holding that property interests are created by "existing rules or

Declining to adopt either school of thought, the court remanded for a determination of state contract and employment law as they bear on the issue of *de facto* tenure, going even further to suggest that states could simply pass laws specifically addressing implied contracts in the context of tenure in their universities. 13 F.3d at 365.

Even if the Tenth Circuit court correctly identified a split among the circuits on *de facto* tenure, it is inconsequential to the case *sub judice*. The outcome – that Ms. Gray did not have *de facto* tenure – is the same under the analysis set forth in *Roth* and *Perry* and followed in the cases discussed herein, and under the strict state law analysis advanced in *Jones*: The *Gray* court looked to state law regarding "something very much like 'tenure' " in Georgia's public school system for elementary and secondary school teachers in applying the *Roth* analysis to Ms. Gray's facts. (Petition for Cert., p. 8a). *See also* n. 2, *supra*.[6] Such a split, if it does exist, is not an adequate basis upon which to grant certiorari.

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understandings that stem from an independent source *such as state law* – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577 (emphasis added).

[6] Moreover, even if the analyses applied by the circuit courts were not true to the holding of *Roth* concerning the role of state law, the United States Supreme Court has long held, "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 245 (1937).

Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972), is also ineffective to show a circuit split on the question of a property interest in *de facto* tenure. The case concerned a public school teacher whose contract was not renewed after twenty-nine years of employment. The matter was decided by the district court before *Roth* and *Perry v. Sindermann* were handed down, and decided by the Court of Appeals in light of the two new Supreme Court pronouncements. *Id.* at 179. The Fourth Circuit Court reversed the district court's dismissal, finding simply that the plaintiff had stated a cause of action on the Fourteenth Amendment's Due Process Clause. *Id.* at 182-183. Neither *Johnson*, nor any of the other cases discussed herein or cited in the Petition, show a split among the circuits that calls for review by this Court.

III. CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny this petition for a writ of certiorari as the decision below is merely a restatement and fact-specific application of the law of procedural due process as established in *Board of Regents v. Roth* and *Perry v. Sindermann*, and there is no split

among the circuits on the issue of *de facto* tenure such as to require review by this Court.

Respectfully submitted,

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